No. 93-539

IN THE

Supreme Court of the United States

October Term, 1993

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

against

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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(3406—LC10-560—1993)

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Questions Presented

1. Whether, under the test this Court enunciated in *Lemon v Kurtzman*, 403 US 602 (1971), New York State violated the Establishment Clause when it provided a legislative solution, welcome to both sides of an intractable conflict between residents of a village composed almost exclusively of members of the Satmar sect of Judaism and its school district, over where the village's handicapped children should receive the free public educational services to which the law entitles them, because the state considered the secular concerns of village residents, and enacted legislation that created a separate school district whose boundaries are coterminous with the village.

2. Whether the test this Court enunciated in *Lemon* should be used to determine the constitutionality of the State's action under the Establishment Clause, if its second prong were to be read as precluding the State from enacting legislation that takes the secular concerns of a religious community into account, regardless of its neutrality in doing so.

Parties

The parties to the proceeding below are:

1. Louis Grumet, Plaintiff.

2. Albert W. Hawk, Plaintiff.

3. Board of Education of the Kiryas Joel Village School District, Defendant

4. Board of Education of the Monroe-Woodbury Central School District, Defendant.

5. The Attorney General of the State of New York appeared under New York Executive Law § 71 to defend the constitutionality of the legislation.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Attorney General of the State of New York respectfully prays that a writ of certiorari issue to review the order of the New York State Court of Appeals entered in this action on July 6, 1993. The order is annexed as Appendix "A". The order of the Court of Appeals modified an order of the Appellate Division, Third Department, entered on

December 31, 1992, that struck down chapter 748 of the Laws of 1989 as a violation of the Establishment Clause of the First Amendment to the United States Constitution and Article XI, section 3 of the New York State Constitution, by declining to decide the state constitutional issue, and as modified, affirmed it. The Appellate Division had affirmed a judgment of the New York State Supreme Court.

Opinions Below

The opinion of the Court of Appeals, rendered on July 6, 1993, is officially reported at 81 NY2d 518 and unofficially at 62 USLW 2045. It is set forth as Appendix "B".

The opinion of the Appellate Division, rendered on December 31, 1992, is reported at 187 AD2d 16, 592 NYS2d 123 (3d Dept 1992). That decision and order are appended as Appendix "C".

The opinion of the Supreme Court, Albany County, dated January 22, 1992, is reported at 151 Misc 2d 60, 579 NYS2d 1004, and is appended as Appendix "E".[1]

Jurisdiction

The order of the Court of Appeals was entered on July 6, 1993. This petition for certiorari is filed within 90 days of July 6, 1993. The Court's jurisdiction to review the case rests upon 28 USC § 1257(a).

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[1]The Supreme Court's Order and Judgment is appended as Appendix "D".

Constitutional and Statutory Provisions Involved

United States Constitution Amendment I; New York State Laws of 1989, chapter 748. These provisions are set forth as Appendix "F".

Statement of the Case

Pursuant to chapter 748 of the Laws of 1989, and effective July 1, 1990, the New York State Legislature established a union free school district to be known as the Kiryas Joel Village School District. The new school district's boundaries are coterminous with the boundaries of the duly incorporated Village of Kiryas Joel (hereafter referred to as "the village"), in the Town of Monroe, Orange County, New York.

The Village of Kiryas Joel is a community of Satmar Hasidic Jews. The community practices a lifestyle distinct from the outside communities. This lifestyle was described by the court below in *Board of Education v Wieder*, 72 NY2d 174 (1988). (That case involved the manner in which special education services to the village's handicapped children were to be provided.) Separation of sexes is observed within the village. Yiddish is the principal language. Neither television, radio nor English language publications are generally used. There is a male and female dress code: the boys wear log side curls, head coverings and special garments. The children, for the most part, are educated in religious schools, the boys in the United Talmudic Academy and the girls in Bais Rochel, an affiliated school. The boys are educated in the Torah and the girls learn the things they need to know as adult women in the community. *See, Board of Education v Wieder, supra*, 72 NY2d at 179-180, for fuller details.

Before the legislative enactment at issue, the residents of the village fell within the jurisdiction of the Monroe-Woodbury school district. The challenged legislation was enacted following a series of court cases involving disputes between the residents of Kiryas Joel and the Board of Education of the Monroe-Woodbury school district concerning the provision of special services to the handicapped children of the Village of Kiryas Joel. (This history is fully described in the affidavit of Superintendent Terrence Olivo of the Monroe-Woodbury school district reproduced as Appendix "G"; *see also, Board of Education v Wieder, supra*, 72 NY2d at 179.) At the time that *Board of Education v Wieder* was before the Court of Appeals, the Monroe-Woodbury school district had offered the village's handicapped students the special services to which they were entitled under federal and state law[2] at the district's public schools. The inhabitants of the village wanted the services to be provided at the village parochial schools or at a neutral site. Both sides sought a declaration in that case that the services *must* be provided at their claimed location. The Court of Appeals held that services were not *required* to be provided at any of the locations. While the services could be provided off the public school premises, they were not required to be provided at the village schools or even at a neutral site. The court noted the services could possibly be provided at a neutral site, but left the constitutionality of the specific location an open question. 72 NY2d at 189, and 189 n 3.

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[2]Individuals with Disabilities Education Act (IDEA), 20 USC § 1400 *et seq.*, and the implementing regulations, 34 CFR Part 300 *et seq.*, the Rehabilitation Act of 1973 § 504 (29 USC §§ 794-794[c]) and the implementing regulations at 34 CFR 99; Article 89 of New York State Education Law and Regulations, 8 NYCRR Part 200.

After the decision, the Monroe-Woodbury school district continued to offer its services to the village students within its public schools, but they did not attend because they felt that Monroe-Woodbury's refusal to accommodate their distinct language and cultural needs would have a "major adverse effect on their educational progress" (Aff. of Abraham Wieder, reproduced as Appendix "H"; *see also*, Olivo affidavit, Appendix "G"). Chapter 748, Laws of 1989, was enacted in an effort to resolve the problem.

At the time the legislation was signed, approximately 100 handicapped students in the village were not receiving the special education services they needed (Governor's Approval Memorandum, Appendix "I"). The legislation created a public school district in which these children could receive a secular education. It was endorsed by the village, the Monroe-Woodbury school district and the Orange County Executive. The statute became effective July 1, 1990. The new school district operates a public school which provides special education services to the district's handicapped children.[3] Under the statute, the district must operate in a secular manner.

The respondents brought a declaratory judgment action in the New York State Supreme Court which challenged the legislation as violative of the Establishment Clause of the First Amendment to the United States Constitution and

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[3]Although most of these children reside within the new district, there are some who attend from other school districts at the latters' direction and pursuant to approval of the New York State Department of Education.

Article XI, section 3 of the New York State Constitution.[4] The Attorney General appeared in this action under New York Executive Law § 71 to defend the constitutionality of the legislation.

The Supreme Court declared the statute to be a violation of the Establishment Clause of the First Amendment to the United States Constitution and "its New York State counterpart, Article XI, section (3)". (98a)[5] The court held that the statute creating a secular school district within the Village of Kiryas Joel violated all three prongs of the test outlined in *Lemon v Kurtzman*, 403 US 602 (1971). (96a).

The Appellate Division, with one Justice dissenting, affirmed the judgment of the Supreme Court, holding that the legislation violated the first two prongs of the *Lemon* test (the statute must have a secular purpose and its primary effect must neither advance nor inhibit religion). (60a, 63a).

It held that the purpose of the statute was "not merely to provide special educational services to the handicapped children of the Village, but to provide those services within the Village so that the children would remain subject to the language, lifestyle and environment created by the commu-

[4]Originally, respondents were joined by the New York State School Board Association as plaintiffs. The Appellate Division later dismissed the Association for lack of standing and the Court of Appeals denied leave to review that issue. In addition, the original defendants were the New York State Department of Education, various officials of the department, and the State Comptroller. The current petitioners moved to intervene and were added as defendants, while the action was discontinued as to the original defendants.

[5]The numbers in parentheses refer to pages in the Appendix.

nity of Satmarer Hasidism and avoid mixing with children whose language, lifestyle and environment are not the product of that religion" (61a). The court rejected the notion that there was a secular need for the legislation, based on the fact that special education services were available to the village's handicapped children from the Monroe-Woodbury District (61a-62a). It also found the statute to violate the primary effect prong of the *Lemon* test because the statute achieved segregation of the religious community from the outlying community by creating a school district within a religious enclave. The majority wrote that this affected a symbolic union between church and State, noting again, that the services obtained by the legislation were already available elsewhere and that the dispute between communities was based on the language, lifestyle and environment of the village children which is rooted in the religious tenets, practices and beliefs of the community (63a-64a). The court did not reach the third prong of the *Lemon* test (it must not require the State to be excessively entangled in matters of religion) (67a). It simultaneously concluded that the statute violated the New York Constitution, without any separate discussion (60a).

The dissenting justice (Levine, J.) concluded, upon application of the *Lemon* test to the statute, that it is facially valid under both United States and New York State constitutions. Justice Levine drew a distinction between a statute's facial invalidity and its invalidity as applied and concluded that even under the majority's assumptions, the statute is valid on its face as a limited, permissible accommodation to the values represented by the Free Exercise Clause of the First Amendment (68a-69a).

Justice Levine found the legitimate secular purpose in the passage of the legislation to be the provision of publicly supported secular special educational services to the handicapped children of the village—services they needed and to which they were entitled at a neutral site in the village. He concluded that the first prong of the *Lemon* test is passed as long as the statute was not motivated wholly by a religious purpose and that the expressed intent of the Legislature should generally be taken at face value (69a-70a).

The dissent also disagreed with the majority's finding that the primary effect of the legislation is to advance religion. Justice Levine concluded that no symbolic link between church and State had been shown (70a, 78a). The school was physically separate from the village schools and other places of religious observance, and it was run in a purely secular manner. Thus, it was equivalent to a public school's operation at a neutral site (74a).

Emphasizing that the challenge mounted here is a facial one only, he found that the court was bound to look at the statute as a response to the stated position of the Satmar sect in the record here as well as in previous litigation with respect to provision of special education services. He noted that the Satmarers' stated motive for refusing to send their handicapped children to the Monroe-Woodbury public schools was not a religious one, but to protect the children from the psychological and emotional trauma caused by exposure to integrated classes outside the village, where they claimed that the professional staff did not adequately address the children's language and cultural needs. These bona fide secular needs, even if derived from religious beliefs, may not defeat their entitlement to the purely secular services provided by the State (70a-73a).

In the alternative, he said that even if the Satmarers' refusal to avail themselves of the services offered at Monroe-Woodbury public schools was based on religious reasons, the accommodation of the State to those beliefs did not have the primary effect of advancing religion. Rather, the statute lifts a substantial burden on the sect's free exercise of religion. For without it, he found, the Satmarers would either have to forfeit publicly supported education services for their handicapped children or their religious convictions. He noted that the legislation followed the Satmarers' failure to secure the educational services from Monroe-Woodbury at a neutral site. Indeed, because the statute lifts a burden on free exercise, the symbolism of government endorsement is entitled to relatively little weight in determining a statute's primary effect (78a-81a).

Additionally, the dissent found no excessive governmental entanglement with religion since the school is not pervasively sectarian, but is entirely secular under the challenged statute (82a-83a). He also concluded that the legislation is valid under the New York State Constitution (83a).

On July 6, 1993 the Court of Appeals, by a 4 to 2 vote, modified the Appellate Division's order to the extent that it invalidated the legislation on the ground that it violated the New York State Constitution and declined to reach the state constitutional issue, and as so modified, affirmed it. (17a).

The court's opinion (by a three-judge plurality) held that the legislation violated the second prong of the *Lemon* test in that its primary effect was not to provide the village's handicapped children with educational services, but to yield to the demands of a religious community whose separatist tenets create tension between needs of students and relig-

ious practices. This conclusion was premised upon the fact that educational services were always available to these students from the Monroe-Woodbury school district (12a-13a, 16a). The court found that the provision of a secular public school in the village goes beyond the neutral site contemplated by this Court in *Wolman v Walter*, 433 US 229 (1977), since the school district is conterminous with the Hasidic community of Kiryas-Joel and the school board members who would be elected from the community would all be members of the same religious sect (15a-16a). It wrote that, "Regardless of any beneficent purpose behind the legislation, the primary effect of such an extensive effort to accommodate the desire to insulate the Satmarer Hasidic students inescapably conveys a message of governmental endorsement of religion. Thus, a 'core purpose of the Establishment Clause is violated'", quoting *Grand Rapids School Dist. v Ball*, 473 US 373, 389 (1985) (16a). The court concluded that the legislature "may not treat the Satmarer community as separate, distinct and entitled to special accommodation." (16a).[6]

[6]There were two concurring opinions. Judge Hancock agreed with the majority that the second prong of *Lemon* was violated, but also found that the first prong was similarly violated because the statute was solely intended to accommodate the villagers' needs to meet their religious requirements.(28a-36a). Chief Judge Kaye agreed with the majority that the second prong of *Lemon* was violated, but would not have applied the *Lemon* test at all to the circumstances presented here. She held that legislation that singles out a particular religious group for special benefits or burdens should be evaluated under a strict scrutiny test, which would require the law to be closely fitted to a compelling state interest. Here, she found that there was a compelling reason for the state to bestow what she deemed an extraordinary benefit. Nonetheless, she concluded that the legislation was invalid because the creation of a school district with all the powers of a union free district went beyond the creation of a neutral site where the village's handicapped students could receive services. (17a-28a).

The dissenting opinion (Bellacosa, J., with Titone, J. concurring) vigorously disagreed with the majority and concluded that there is strong precedent for what the New York State legislature did, and that it does not violate *Lemon* because in its context the legislation's primary effect neither advances religion nor suggests an endorsement of it (49a). It criticizes the court's decision to strike the statute on the ground that the State gave into Satmar religious concerns, in light of the Satmar claims that there were legitimate secular reasons that a separate school district was needed, secular reasons "which are entitled to an enlightened and permissible societal accommodation." (50a).

Judge Bellacosa noted that the statute required the new school district to operate in an entirely secular manner, in sharp contrast to the religious lifestyle practiced in the rest of the village, and the district's effort to create such a nonsectarian educational environment is indicative of a secular compromise (51a). The dissent asserts that under the court's opinion, a "symbolic union" always and automatically emerges when control over a public school is placed in the hands of secularly-elected individuals who have a common set of religious beliefs—a rule that stigmatizes the aid as aid to a particular denomination merely because of their membership in a common sect. Judge Bellacosa charges that the court's opinion deprives the village citizens of "certain educational prerogatives in contravention of their fundamental right to self-governance" and implicates their free exercise of religion "simply because they have chosen to live and believe in a particular way together in an incorporated village. . . . In effect, their Free Exercise rights are burdened by draping a drastic, new disability over the shoulders of young pupils solely on account of the religious beliefs of their community (*see, Church of the Lukumi Babalu Aye, Inc. v*

City of Hialeah, ____ S Ct ____, 61 USLW 4587 [Scalia, J. concurring], *supra*; *see also*, *McDaniel v Paty*, 435 US 618)." (52a). He warns that the majority's refusal to accept the villagers' concerns as anything but religious is alien to cherished American ideas and values, and punishes religious uniqueness (52a-53a). He concludes by finding the legislation a reasonable accommodation of the Satmarer's free exercise of religion (54a).

The petitioners applied to the Court of Appeals for continuation of the automatic statutory stay that had been in effect, pursuant to New York Civil Practice Law and Rules § 5519, throughout the state appellate process. That court denied the application in an order dated July 19, 1993 (Smith, J.).

Thereafter, both school boards applied to this Court (Thomas, J.) for a stay of the Court of Appeals' order, with the Attorney General in support. Upon Justice Thomas' referral of the applications to the full Court, the applications were granted (____S Ct____, 62 USLW 3060 [July 26, 1993]), and the order of the Court of Appeals was stayed until final disposition or until a petition for a writ of certiorari is denied.

REASONS FOR GRANTING THE WRIT

This case presents an important issue as to whether a State may address the secular needs of a religious community without being perceived as favoring their religion in violation of the Establishment Clause. We believe the court below misapplied the *Lemon* test and that, in any event, the

type of accommodation involved here is consistent with the Establishment Clause.

The New York State Legislature and executive branches came to the aid of a vulnerable segment of its population - the handicapped children of the religious people living in the Village of Kiryas-Joel. The State found the parents and the school district in which they were situated in a standoff, after a long history of litigation that culminated in a decision in the New York Court of Appeals that left them without a resolution, about where the free secular educational services mandated by state and federal law should be given to the children; and it found the children without any educational services at all. The State enacted legislation that created a new secular public school district along the village boundaries, with all the powers and duties of a union free school district.

The students could then attend a secular public school in an environment that would provide them with the bi-cultural, bi-lingual education their parents claimed they needed but was lacking in the Monroe-Woodbury schools and would thus spare them the emotional and psychological trauma that their parents claimed resulted from attendance at Monroe-Woodbury's public schools. On the other hand, Monroe-Woodbury would no longer have to provide for these students. No public money would be spent in or for a religious institution or for educating the students in a religious manner. These students were already entitled to the services to be provided by the new school district. Only the situs of the services was changed.

In striking down as unconstitutional on its face the attempt by two branches of New York State's government to

provide a neutral solution to two immovable parties, merely because it embodied an accommodation to the secular concerns of members of a religious community, the Court of Appeals has ruled that any accommodation to a religious community is a violation of the Establishment Clause of the First Amendment to the Constitution. This conflicts with the traditional principle, continuously reaffirmed by this Court and essential to the freedoms established by the Constitution, that some accommodation for concerns arising out of one's practice of a religion does not necessarily conflict with the Establishment Clause, and, indeed, may be desirable.

New York's highest court used the second prong of the test in *Lemon v Kurtzman*, 403 US 602 (1971), and its progeny as a basis upon which to rule that any accommodation of a concern of a religious group is an advancement, promotion and favoritism of their religion that is prohibited by the Establishment Clause of the First Amendment. This ruling extends that test so far outside the circle of protection of the Establishment Clause that it leaves behind the freedoms intended to be preserved. The decision evinces a hostility to the group's religious way of life and a denigration and diminution of the secular concerns that derive from it.

In the alternative, if the myriad of cases decided after this Court laid down the three part *Lemon* test left a legacy that demands such a conclusion of hostility toward the legitimate secular concerns of the Satmar community, then there is no longer a place for it in Establishment Clause jurisprudence.

The Court of Appeals Decision Conflicts With this Court's Holdings that Recognize that Accommodation Does Not Per Se Violate the Establishment Clause.

While recognizing that the legislation was " 'an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the Village of Kiryas Joel, whose population are all members of the same religious sect'"(7a, quoting from the Governor's Approval Mem, Bill Jacket, L 1989, ch 748), and even acknowledging that this effort was a "beneficent" one (16a), the court below nonetheless found its primary effect to "accommodate the desire to insulate the Satmarer Hasidic students [which] inescapably conveys a message of governmental endorsement of religion." (16a).

The court made a grave and dangerous mistake in equating an accommodation with an endorsement, and in using *Lemon* as the prop for its conclusion. It is essential for this Court to clarify that neither *Lemon* nor analysis under any of its other precedents makes every accommodation to religious groups an endorsement or promotion of their religion.

To the contrary, this Court has a long history of recognizing the need and desirability in some cases for the government to make allowances for concerns of religious groups, which are made to promote the freedom of religion guaranteed by the First Amendment and which do not run afoul of the Establishment Clause. *Zorach v Clauson*, 343 US 306 (1951)—New York law may provide for early release from school for students to attend religious schools; *Walz v Tax Comm. of the City of New York*, 397 US 664 (1970)—New York City could grant property tax exemptions to religious

organizations for religious properties; *Wisconsin v Yoder*, 406 US 205 (1972)—exemption for Amish children from compulsory education laws is permissible; *Wolman v Walter*, 433 US 229 (1977)—secular therapeutic services may be provided to sectarian students separately, on a neutral site. The New York Court of Appeals suggested in an earlier litigation between the petitioners here (*Board of Education v Wieder*, 72 NY2d 174, 189 n. 3 [1988]) that *Wolman* might supply the answer to this conflict; *Corporation of Presiding Bishop v Amos*, 483 US 327 (1987)—religious organization may be exempted from Title VII's prohibition against discrimination on the basis of religion. In *Texas Monthly, Inc. v Bullock*, 489 US 1, 18 n. 8 (1989), Justice Brennan was careful to note, in striking down a statute giving an exemption from tax to publications that advanced the tenets of a religious faith, that his holding "in no way suggest[s] that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause . . ." (emphasis in original). In *Employment Div., Dept. of Human Resources v Smith*, 494 US 872, 890 (1990), this Court, while upholding an Oregon decision to deny unemployment benefits to two American Indians who ingested peyote during a religious ceremony and were subsequently dismissed from their employment for work-related misconduct, referred approvingly to state laws exempting the religious use of peyote from the criminal law. This Court reasoned that while such a nondiscriminatory religious-practice exemption may be permitted, or even desirable, it is not constitutionally required. Indeed, as Justice O'Connor noted in her concurring opinion in that case (494 US at 902), "The First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."

The Court of Appeals majority opinion also runs directly counter to Justice Souter's words in his concurring opinion in *Lee v Weisman*, ____ US ____, 112 S Ct 2649, 2676-2677 (1992), which was joined by Justices Stevens and O'Connnor.

> That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. *See, e.g., Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos*, 483 U.S. 327 (1987); see also *Sherbert v Verner*, 374 U.S. 398 (1963). Contrary to the views of some, such accommodation does not necessarily signify an official endorsement of religious observance over disbelief.

Accommodation has always been considered a zone between the Free Exercise Clause on the one side and the Establishment Clause on the other. Tribe, L., *American Constitutional Law*, § 14-4 at 1166-1169, § 14-7 at 1194 (2d ed. 1988). Even before the First Amendment was drafted, accommodations of religion were common. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 *George Washington Law Review* 685, 714 (1992). Naturally, this Court incorporated the age-old principle of accommodation in its *Lemon* decision when it laid down the second prong of the test: the state may neither "advance *nor inhibit*" religion (emphasis added) (*Lemon* at 612).

Yet, the Court of Appeals decision threatens to wipe out the whole concept of taking religion into account, in direct conflict with this Court's precedents. Under its decision, once concerns of a religious group are considered and accommodated by the government in passing legislation aimed at addressing these concerns, the Establishment Clause is automatically violated because the government will be perceived as endorsing or favoring the religion itself. This conclusion is offensive to the value of religious freedom and does violence to the concept in the Establishment Clause that a State may not act in a way hostile to religion.

On its way to its conclusion, the Court of Appeals completely denies that the Satmar community, because of the religious nature of its lifestyle and the general homogeneity of its population, can have legitimate secular concerns. The court refused to acknowledge the claims made by the Satmar parents that their opposition to attendance at the Monroe-Woodbury public schools was predicated solely on their concern that attendance by their special needs children in those district schools, where they claim their language and customs are not accommodated and even meet with some hostility, caused the children to suffer emotional trauma and had a negative effect on their educational progress. The court also noted that since the community is composed exclusively of Satamarer Hasidim, the democratically elected board of education would be composed entirely of Satmar Hasidim. Therefore, the court reasoned, the basis for their conflict with Monroe-Woodbury is a religious one, consonant with their desire to be an insular community, and the solution achieved by the legislation creating a new school district represents nothing more than a symbolic endorsement of the Satmar position.

In so doing, the court proclaims that the Establishment Clause precludes the community from ever having their secular concerns addressed by government because of the religious nature of its lifestyle and the general homogeneity of its population. In other words, the opinion flatly disqualifies the members of the community from being the beneficiaries of state action which would otherwise be available to address secular issues, for the sole reason that it is a religious community, and therefore any state action directed at it would be a promotion, endorsement and advancement of the religion it practices.[7] First, the idea that religious people cannot act in a secular manner or have the same rights as others in secular matters is an idea that has been discredited long ago in *McDaniel v Paty*, 435 US 618 (1978), and is evidence of hostility to religion. Second, the composition or lifestyle of the population does not alter the neutrality of the solution or secularity of the concerns that

[7]The Court of Appeals decision directly conflicts in this respect with the Eighth Circuit Court of Appeals decision in *Clayton v Place*, 884 F2d 376 (1989), *cert den*, 494 US 1081 (1990). In that case the court upheld a school board's decision to enforce a school district rule prohibiting dancing at school affairs, finding that there were secular reasons for doing so, even though the ban reflected a religious view as well. The Eighth Circuit held,

> "The mere fact that a governmental body takes action that coincides with the principles or desires of a particular religious group, however, does not transform the action into an impermissible establishment of religion. *See Bowen* [*v Kendrick*], 108 S Ct [2562] at 2571 n. 3; *Lynch* [*v Donnelly*], 465 US [668], at 682, 104 S Ct at 1363; *Harris v. Mc Rae*, 448 US 297, 319-20, 100 S Ct 2671, 2689, 65 L Ed 2d 784 (1980); *see also Webster v. Reproductive Health Servs.*, ____ US ____, 109 S Ct 3040, 3082, 106 L Ed 2d 410 (1989) (Stevens, J., concurring and dissenting)."

Clayton v Place, *supra* 884 F2d at 380.

begged the State's assistance and intervention in an impasse that left innocent handicapped children in the middle, without the educational services to which the law entitled them.

Furthermore, the court's idea that the community of Kiryas-Joel cannot have legitimate secular concerns blocked its vision when it analyzed the state action, so that the legislation was separated from its context. The court looked only at the State's action in terms of what it achieved for the Satmar community, and not why the legislation became necessary, what it accomplished for the district in whose charge the Kiryas-Joel students had previously been entrusted, or the secular nature of the school it created. It lost sight of what this Court has said the aim of the second prong of *Lemon* is: to prevent government decisionmakers from abandoning neutrality and acting with intent to promote a particular point of view in religious matters. *Corporation of Presiding Bishop v Amos, supra* at 335.

What the Court of Appeals should have done was to examine whether the State, in creating a new school district co-terminus with the village of Kiryas-Joel, was favoring parties on one side of the dispute over where free appropriate educational services were to be given the village's handicapped students. It should have looked at the legislation with an eye to whether the State was promoting the tenets of the Satmar sect of Judaism, or endorsing their religious lifestyle over the lifestyle prevalent within the Monroe-Woodbury school district. It should have considered that the opposing parties in the long dispute over the location of the educational services were in agreement that this legislation was a solution acceptable to everyone and made way for peace between the communities. The "adher-

ents" and "nonadherents" alike felt the State had solved their problem. *See*, *Lynch v Donnelly*, 465 US 668, 687-8 (1984) (O'Connor, J., concurring). While the legislation creating a separate school district encompassing the village of Kiryas-Joel obviously addressed only the village in its language, it is clear from the participation of both sides of the conflict in this litigation that they both feel equally included in the State's efforts.

The court's examination out of context is antithetical to the rule established by this Court in *Allegheny County v Greater Pittsburgh ACLU*, 492 US 573 (1988), and resulted in a distorted point of view and erroneous conclusion that altogether missed the values embodied in the Establishment Clause and in the second prong's taboo against government action inhibiting religion. A review and reversal of this decision by this Court is essential to preserve the true meaning of the Establishment Clause, to refocus the judiciary on ascertaining the neutrality of legislative actions, and to clarify further the appropriate analysis to be given a state action.

Not only did the Court of Appeals wrongly apply the second prong of *Lemon*, but the statute survives examination under the other two prongs as well. The first prong is that the statute has to have a secular purpose. *Lemon*, 403 US at 612. The purpose for the legislation here is easily ascertained from an examination of the legislative history as well as the history of its beneficiaries -- that is, the Kiryas Joel school district and the Monroe-Woodbury school district. The new school district was created to end long years of strife and litigation between the inhabitants of the village and those of the Monroe-Woodbury school district (to which the village initially belonged) over how special education

services would be delivered to the village's handicapped students. As the dissenting opinions in the Court of Appeals as well as in the Appellate Division found, the expressed intent of the legislature should be accepted, and since it was not motivated wholly by a religious purpose, this test is satisfied.

The third prong, whether the legislation fosters an excessive entanglement with religion (*Lemon*, at 613), is not implicated in this case at all. The instances in which this Court struck down a statute involving aid for education as a violation of the Establishment Clause involved State aid to schools which were pervasively sectarian. *See, e.g., Aguilar v Felton*, 473 US 402 (1985); *Lemon v Kurtzman, supra*, 403 US 602, *supra*. The analysis, therefore, necessarily involves an examination of "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority". *Lemon v Kurtzman, supra*, 403 US at 615. It is not the nature of the pupils that may present an entanglement problem, but the nature of the institution. *Wolman v Walter, supra*, 433 US at 247-248.

Here, the character and purpose of the institution receiving state aid is a secular public school in a newly formed public school district, designed to provide a secular education to the handicapped students of Kiryas Joel. The aid involved is the same fund that the State was obligated to provide to those students to attend the Monroe-Woodbury public schools before the creation of the new school district. Lastly, the statute does not create any relationship whatever between the government and religious authority, because under its terms the board of education is autonomous and not connected to the religious authority that operates the parochial schools in the village. In sum, notwithstanding the religious practices of the individuals

who may sit on the board of education, because the statute creates a school district that is secular without connection to a sectarian institution, there is no entanglement with religion at all. Simply put, matters of religion have no more place in the public school district created by the statute than they do in any other public school district.

This Case Presents an Appropriate Vehicle for Reexamination of the Lemon Test.

Although the second prong of the *Lemon* test clearly proscribes a State's endorsement, favoritism or promotion of one religion over another religion or over no religion at all, application of this test in recent years has become more complex as the waters have gotten muddier with each new decision. It has been suggested by members of this Court and by numerous commentators that it is time to reexamine it. *See, Lamb's Chapel v Center Moriches Union Free School District*, ____ US ____, 61 USLW 4549, 4553 (1993), concurring opinion of Scalia, J. joined by Thomas, J., for a comprehensive list of cases and commentaries; *see also*, Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 *Mich L. Rev.* 266 (1988). Indeed, the majority opinions in two of this Court's most recent Establishment Clause cases do not invoke the test at all. *Lee v Weisman, supra*, ____ US ____, 112 S Ct 2649, and *Zobrest v Catalina Foothills School Dist.*, ____ US ____, 125 L Ed 2d 1, 61 USLW 4641 (1993).

Here, the Court of Appeals used the *Lemon* test in such a strained manner as to lead to a tortured result, out of sync with this Court's precedents and the essence of the Establishment Clause. This case presents the opportunity to wipe the film off the glass, and to re-define the appropriate analysis to be made of legislation affecting religious groups. All States need to

know how they may legislate in the area of religion, and whether they can tend to the secular concerns of religious groups within their jurisdiction. Must they turn a deaf ear, or may they use their power to meet secular needs of *all* elements of their populations, including the religious among them?

Conclusion

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
October 1, 1993

Respectfully submitted,

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Attorney General of the State of
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Of Counsel

APPENDIX A—Order of the New York State Court of Appeals.

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

3 No. 120

LOUIS GRUMET, &C., *et al.*,

Respondents,

v.

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT, *et al.*,

Appellants.

The Hon. Judith S. Kaye, Chief Judge, Presiding

The appellants in the above entitled appeal appeared by DeLorenzo Gordon Pasquariello Weiskopf & Harding, P.C.; Miller Cassidy Larroca & Lewin, Esqs. and Ingerman Smith Greenberg Gross Richmond Heidelberger Reich & Scricca, Esqs.; the respondents appeared by Jay Worona, Esq.; appearance by Hon. Robert Abrams, Attorney General of the State of New York; and *amici curiae* appeared by Marc D. Stern, Esq.; Bernard F. Ashe, Esq.; Stanley Geller, Esq. and Gary J. Simson, Esq.

The Court, after due deliberation, orders and adjudges that the order is modified, with costs to plaintiffs, in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Smith. Chief Judge Kaye and Judges Simons and Hancock concur, Chief Judge Kaye and Judge Hancock in separate concurring opinions. Judge Bellacosa dissents and votes to reverse in an opinion in which Judge Titone concurs.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

DONALD M. SHERAW,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 6, 1993.

APPENDIX B—Opinion of the New York State Court of Appeals.

STATE OF NEW YORK
COURT OF APPEALS

3 No. 120

LOUIS GRUMET, &C., *et al.*,

Respondents,

v.

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT, *et al.*,

Appellants.

Nathan Lewin, for appellant BOE Kiryas Joel Village.

Lawrence W. Reich, for appellant BOE Monroe-Woodbury.

Julie S. Mereson, for Attorney General.

Jay Worona, for respondents.

American Jewish Congress; New York State United Teachers; Committee for Public Education and Religious Liberty; and Anti-Defamation League, *amici curiae*.

SMITH, J.:

Plaintiffs, citizen taxpayers of this State, maintained this action against defendants Board of Education of the Kiryas Joel Village School District and Board of Education of the Monroe-Woodbury Central School District, challenging the enactment of Chapter 748 of the Laws of 1989. That statute established a separate public school district in and for the Satmarer Hasidic Village of Kiryas Joel, Orange County.[1] Plaintiffs alleged that Chapter 748 of the Laws of 1989 violates the establishment clause of the First Amendment of the Federal Constitution. Supreme Court granted plaintiffs' summary judgment motion, concluding, *inter alia*, that Chapter 748 of the Laws of 1989 has the effect of advancing the religious beliefs of the Satmarer Hasidim inhabitants of the village of Kiryas Joel. The Appellate Division affirmed, determining that the challenged statute violates the second prong of the test in *Lemon v Kurtzman*, 403 US 602 (187 AD2d 16). Defendants appeal as of right from the order of the Appellate Division which finally determines an action that directly involves the construction of the Federal Constitution (CPLR 5601[b][1]). The issue before us is whether Chapter 748 of the Laws of 1989, entitled "AN ACT to

[1]Chapter 748 of the Laws of 1989, provides, in part:

§1. The territory of the village of Kiryas Joel in the Town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.

§2. Such district shall be under the control of the board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

establish a separate school district in and for the village of Kiryas Joel, Orange county", violates the establishment clause of the First Amendment of the Federal Constitution. We now modify the order of the Appellate Division, agreeing that the statute violates the establishment clause of the First Amendment of the Federal Constitution.

I.

The Village of Kiryas Joel was formed by, and is composed almost entirely of members of the Satmarer Hasidic sect. In addition to separation from the outside community, separation of the sexes is observed with the village. Yiddish is the principal language of Kiryas Joel. No television, radio, or English language publications are generally used. There is a male and female dress code. For the most part, the children are educated in religiously affiliated schools. The boys attend the United Talmudic Academy and are educated in the Torah. The girls attend Bais Rochel and are instructed on what they will need to function as adult women (*see, Board of Educ. v Wieder*, 72 NY2d 174, 179-180). These differences have led to a series of court cases involving the Satmarer Hasidim.[2]

[2](*See*, e.g., *Parents' Assn v Quinones*, 803 F2d 1235 [the Second Circuit preliminarily enjoined implementation of a plan by the New York City Board of Education to provide federally funded remedial education for handicapped girls from Beth Rochel school by closing off nine classrooms of a public school, and dedicating them to the use of the Hasidic girls]; *Bollenbach v Board of Educ.*, 659 F Supp 1450 [The District Court found that the deployment of only male bus drivers to the all-boys United Talmudic Academy had the primary effect of advancing religious beliefs]; *Board of Educ. v Wieder*, 72 NY2d 174 [This Court concluded that Education Law § 3602-c neither compels the Board of Education of the Monroe-Woodbury Central School District to nor prohibits the Board from providing private school handicapped children with special services at the private schools or at a neutral site]).

Prior to the decision of the United States Supreme Court in *Aguilar v Felton* (473 US 402 [1985]), the handicapped children living in Kiryas Joel received special education services from Monroe-Woodbury Central School District personnel in an annex to one of the Kiryas Joel religious schools. In *Aguilar,* the United States Supreme Court considered whether a program under Title I of the Elementary and Secondary Education Act of 1965 authorizing the use federal funds to pay salaries of public employees who teach in parochial schools violated the Establishment Clause of the First Amendment. Concluding that such a program was unconstitutional, the Court stated: "We have long recognized that underlying the Establishment Clause is 'the objective * * * to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other * * *' *Lemon v Kurtzman, supra,* at 614 [and] * * * the scope and duration of [the] Title I program would require a permanent and pervasive state presence in the sectarian schools receiving aid" (*id.* 412-413). In response to the *Aguilar* decision, the Monroe-Woodbury Central School District stopped providing the special education programs at the religious school annex. For some time thereafter, some of the handicapped Satmarer Hasidic children attended special education classes held at the Monroe-Woodbury public schools. However, allegedly because of the "panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different from theirs," the parents stopped sending them to programs offered at the public schools (*Board of Educ. v Wieder,* 72 NY2d, at 181, *supra*).

In *Board of Educ. v Wieder, supra,* this Court construed Education Law § 3602-c[3] to authorize special education services to private school handicapped children and afford them an option of dual enrollment in public schools. We concluded that section 3602-c neither compels boards of education to make special education services available to private school handicapped children only in regular public school classes and programs, nor renders them powerless to provide otherwise (*id.* at 187).

Thereafter, the Legislature enacted Chapter 748 of the Laws of 1989, which created a new union free school district, the Kiryas Joel Village School District, in the incorporated village of Kiryas Joel in the town of Monroe, Orange County. The newly established Kiryas Joel Village School District was coterminous with the Satmarer Hasidic community of Kiryas Joel, and was created within the boundaries of the Monroe-Woodbury Central School District. Chapter 748 of the Laws of 1989 also established a board of education, composed of five to nine members elected by the voters of the village, that would serve for a period not to exceed five years. Chapter 748 of the Laws of 1989 represents "an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of the same religious sect" (Governor's Approval Mem, Bill Jacket, L 1989, ch 748).

[3]Education Law § 3602-c[2] provides, in part:

Boards of education of all school districts of the state shall furnish services to pupils who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent, guardian or person legally having custody of any such pupil.

Section 3602-c(1)(a) defines "services" as "instruction in the areas of gifted pupils, occupational and vocational education and education for students with handicapping conditions * * *."

Plaintiffs Louis Grumet and Albert Hawk commenced this action individually, as citizen taxpayers, and as Executive Director of the New York State School Board Association, Inc. and President of the New York State School Boards Association, Inc., respectively, against the New York State Education Department and various State officials, alleging, *inter alia*, that Chapter 748 of the Laws of 1989 violates the establishment clause of the First Amendment of the Federal Constitution. The Board of Education of the Kiryas Joel Village School District and the Board of Education of the Monroe-Woodbury Central School District intervened as defendants. The parties stipulated to a discontinuance of the action as to the State officials, but, pursuant to Executive Law § 71, the State Attorney General continued to appear in this action in support of the constitutionality of Chapter 748 of the Laws of 1989. Both parties sought summary judgment. On their motion, plaintiffs asserted that Chapter 748 violates the Federal constitutional provisions prescribing separation of church and state. Defendants sought a judgment declaring the facial constitutionality of the statute.

Supreme Court granted plaintiffs' summary judgment motion, concluding that the statute is unconstitutional because it "was enacted to meet exclusive religious needs and has the effect of advancing, protecting and fostering the religious beliefs of the inhabitants of the school district[, and] * * * fosters excessive entanglement with religion" (*Grumet v Board of Educ. of the Kiryas Joel Vil. School Dist.*, Sup Ct, Albany County, January 22, 1992, Kahn, J., Index No. 1054-90). The Appellate Division affirmed, concluding that Chapter 748 of the laws of 1989 "authorizes a religious community to dictate where secular

public educational services shall be provided to the children of the community [and] * * * creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test" (187 AD2d 16, 22).

The prior courts concluded that plaintiffs fulfill the requirement for citizen-taxpayer status contained in State Finance Law § 123-a and, therefore, have standing to maintain this action. That conclusion is not contested on this appeal.

II.

Before this Court, defendants maintain that, based on *Lemon v Kurtzman, supra,* Chapter 748 is constitutionally valid on its face.

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion" (US Const 1st Amend). The First Amendment is made applicable to the states by the Fourteenth Amendment (*see, Everson v Board of Educ.,* 330 US 1; *Murdock v Pennsylvania,* 319 US 105). It is said that the Establishment Clause of the First Amendment means at least that "[n]either a state nor the Federal Government * * * can pass laws which aid one religion, aid all religions, or prefer one religion over another" (*Everson,* 330 US 1, 15 *supra*). As such, Federal and State governments "must maintain a course of neutrality among religions, and between religion and non-religion" (*Grand Rapids School Dist. v Ball,* 473 US 373, 382).

In *Lemon v Kurtzman, supra,* the United States Supreme Court articulated a three-part test for evaluating the constitutionality of governmental actions under the Establishment Clause. The Court stated:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v Allen*, 392 US 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion * * *" *Walz [v Tax Commission*, 397 US 664, 674] (*id. see 612-613.*)

The United States Supreme Court has "particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children" (*Grand Rapids School Dist. v. Ball*, 473 US 373, 383, *supra*). Recently, the Court adhered to the *Lemon* test in *Lamb's Chapel v Center Moriches Union Free School Dist.*, ____ US ____, 61 USLW 4549). Moreover, the court has applied *Lemon* in considering whether prior courts were correct in concluding, on a motion for summary judgment, whether a statute as unconstitutional on its face (*see, Bowen v Kendrick*, 487 US 589, 602). Likewise, we have applied the *Lemon* test to statutes or regulations relating to the education of children, where such statutes or regulations are challenged as violating the Establishment Clause (*see, New York State School Bds. Assn v Sobol*, 79 NY2d 333; *Matter of Klein [Harnett]*, 78 NY2d 662). Thus, we apply the

Lemon test to examine whether the prior courts were correct in concluding that Chapter 748 of the Laws of 1989 is unconstitutional on its face.

III.

While both parties have briefed the first prong of the *Lemon* test, and the Supreme Court found a violation of that prong, the Appellate Division relied exclusively on the second prong and found it violated by the statute here. Because we conclude that the second prong of *Lemon* has been clearly violated, we do not address the first prong.

As stated, the second prong of *Lemon* requires that the principal or primary effect of legislation be one that neither advances nor inhibits religion. Thus, we consider whether the principal or primary effect of the challenged statute advances or inhibits religion. It is clear that the prohibition against state involvement in religion is not limited to direct and funded efforts to indoctrinate citizens in specific religious beliefs but includes a close identification of the responsibilities of government and religion (*see, Grand Rapids School Dist. v Ball*, 473 US 373, 389). In that case, the Supreme Court stated the following:

> Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorse-

ment or disapproval of religion, a core purpose of the Establishment Clause is violated (*id*).

In considering whether the principal or primary effect of the challenged statute advances or inhibits religion, the concern is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denomination as an endorsement, and by nonadherents as a disapproval, of their individual religious choices" (*id.* at 390). An inquiry into this kind of effect "must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years [since t]he symbolism of a union between church and state is most likely to influence children of tender years" (*id.*) Context determines whether a particular governmental action is likely to be perceived as an endorsement of religion (*see, Allegheny County v Greater Pittsburgh Am. Civ. Liberties Union*, 492 US 573, 595-597, *supra*). Governmental action "endorses" religion if it favors, prefers, or promotes it (*see, Edwards v Aguillard*, 482 US 578, 593, *supra*; *Wallace v Jaffree*, 472 US 38, 59-60, *supra*, *Lynch v Donnelly*, 465 US 668, 691, *supra*).

Defendants assert that "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the [challenged] statute would perceive it as [the State's endorsement of the Satmarer Hasidic faith]" (*Wallace v Jaffree*, 472 US 38, 76, *supra* [O'Connor, J., concurring]). However, as the dissent acknowledges, "the Supreme Court has not adopted Justice O'Connor's [objective observer] nuance for detecting in [impermissible] endorsement" of religion by the State (dissent, at p. 11). We agree with the majority of the Appellate Division that the statute not only authorizes a religious

community to dictate where secular public educational services shall be provided to the children of the community, but also "creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test" (187 AD2d, at 22, *supra*).

Chapter 748 of the Laws of 1989 created a new union free school district, the Kiryas Joel Village School District, coterminous with the incorporated village of Kiryas Joel in the town of Monroe, Orange County. This new school district was created within the Monroe-Woodbury Central School District. The statute also established a board of education, composed of five to nine members elected by the voters of the village, that would serve for a period not to exceed five years. The residents of the village of Kiryas Joel are almost exclusively of the Satmarer Hasidic religious sect. Thus, only Hasidic children will attend the public schools in the newly established school district, and only members of the Hasidic sect will likely serve on the school board. We conclude that this symbolic union of church and state effected by the establishment of the Kiryas Joel village school district under chapter 748 of the Laws of 1989 is sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval, of their individual religious choices. Thus, the principal or primary effect of Chapter 748 of the Laws of 1989 is to advance religious beliefs.

The dissent's attempt to analogize this case to the recent Supreme Court case of *Zobrest v Catalina Foothills School Dist.*, ____ *US* ____, *61 USLW 4641*, *supra*, is unavailing. In *Zobrest*, the petitioners, a deaf child and his parents, commenced the action challenging the school district's refusal to provide a sign language interpreter to accompany the child to classes at a Roman Catholic high school. The petitioners alleged that the Individuals with Disabilities Ed-

ucation Act (IDEA) and the free exercise clause of the First Amendment to the Federal constitution required the school district to provide the interpreter, and that the establishment clause did not bar such relief. Concluding that the establishment clause did not bar religious groups from receiving general, "neutral" governmental benefits such as a sign language interpreter, the Supreme Court held:

> The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "handicapped" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking * * * . When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," * * * it follows under prior decisions that provision of that service does not offend the Establishment Clause (slip opn, at 7-8).

We disagree with the dissent's assertion that "no message of endorsement for Satmar theology or its particular separatist tenants * * * can fairly be inferred" (dissent, at p. 13) from a statute that creates a new school district within an existing school district and establishes a board of education, composed entirely of residents of the village of Kiryas Joel who are almost exclusively of the Satmarer Hasidic religious sect. Here, unlike in *Zobrest, supra*, the statute creating a school district and establishing a board of education coterminous with the Satmarer Hasidic village of Kiryas Joel cannot be viewed as part of a general government program. Rather, as stated, the statute represents an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of the same religious sect. Thus, it cannot be said that by the creation of the Kiryas Joel Village School District, the government is offering "a neutral service * * * as part of a general program that 'is in no way skewed towards religion.' "

The United States Supreme Court case of *Wolman v Walter* (433 US 229) is inapposite. There the Court held that "considerations of safety, distance and the adequacy of accommodations" could justify a public school's provision of remedial services in mobile units located on neutral sites near nonpublic school premises (*see, Wolman v Walter*, 433 US, at 247, n 14, *supra*). Contrary to the assertion by the dissent, the legislation at issue in this case does not effect a "unit on a neutral site" serving only sectarian pupils (*see*, dissent, at p. 15). Rather, the statute creates an entirely new school district coterminous with the Satmarer Hasidic community of Kiryas Joel and establishes a school board composed of members elected by the voters of the village. This goes beyond any directive by the Supreme Court or this Court for the provision of special services to handicapped

children at a neutral site (*see, Wolman v Walter,* 433 US 229, 248, *supra; Board of Educ. v Wieder,* 72 NY2d 174, 188, *supra*).

Because special services are already available to the handicapped children of Kiryas Joel, the primary effect of Chapter 748 is not to provide those services, but to yield to the demands of a religious community whose separatist tenets create a tension between the needs of its handicapped children and the need to adhere to certain religious practices. Regardless of any beneficent purpose behind the legislation, the primary effect of such an extensive effort to accommodate the desire to insulate the Satmarer Hasidic students inescapably conveys a message of governmental endorsement of religion. Thus a "core purpose of the Establishment Clause is violated" (*see, Grand Rapids School Dist. v Ball,* 473 US 373, 289, *supra*).

Our conclusion does not, as the dissent declares, "drap[e] a drastic, new disability over the shoulders of young pupils solely on account of the religious beliefs of their community," nor does it "penalize and encumber religious uniqueness" (*see,* dissent, at 20-21). Special services are made available to the Satmarer student within the Monroe-Woodbury school district. Our decision does not impose any additional burdens on the students within Kiryas Joel; it simply determines that the legislature may not treat the Satmarer community as separate, distinct and entitled to special accommodation.

IV.

The Supreme Court has noted that "[i]f a statute violates any of [the three *Lemon*] principles, it must be struck down under the Establishment Clause" (*Stone v Graham,* 449 US 39, 40-41). Thus, our conclusion that Chapter 748 of the

Laws of 1989 violates the second principle of *Lemon* makes it unnecessary for us to comment on whether the statute violates the first and third principles or to address appellants remaining contentions.

Without any separate analysis, the trial court declared the statute unconstitutional under article XI, section 3 of the State Constitution, suggesting that the provision is a "counterpart" to the Establishment Clause. The Appellate Division affirmed on both State and Federal Constitutional grounds, although its discussion, like the trial court's, was limited to the Establishment Clause. Moreover, in this Court the First Amendment is the subject of the parties' focus. In these circumstances, we do not reach the State constitutional issue, which is based on a provision significantly different from the Establishment Clause, both in text and history (*see, Judd v Board of Educ.*, 278 NY 200) and we modify the Appellate Division order accordingly.

Accordingly, the order of the Appellate Division should be modified, with costs to plaintiffs, in accordance with the opinion herein and, as so modified, affirmed.

Grumet v Kiryas Joel
No. 120

KAYE, CHIEF JUDGE (concurring):

Applying the three-pronged *Lemon v Kurtzman* (403 US 602) test, the Court concludes that creation of the Kiryas Joel Village School District violates the Establishment Clause. While I agree that the Laws of 1989, chapter 748 breaches *Lemon's* second prong, and thus join the Court's Opinion, I do not believe that *Lemon* supplies the preferred analytical framework for this case. Rather, in my view, legislation that singles out a particular religious group for

special benefits or burdens should be evaluated under a strict scrutiny test, requiring that the law be closely fitted to a compelling State interest.

The law at issue is precisely the sort of legislation that should be strictly scrutinized, because it provides a particular religious sect with an extraordinary benefit: its own public school system. Although I am willing to assume that the law is addressed to a compelling governmental interest—providing special education and related services to disabled children who would otherwise go without such assistance—the law is not closely fitted to that purpose, as far more moderate measures were available to satisfy that purpose. Accordingly, irrespective of the *Lemon* test,[1] I believe the law violates the Establishment Clause.

I.

My analysis begins with recognition that, factually, this case is unlike prior Supreme Court cases involving the relationship between religion and education. Prior cases generally fall into two broad categories: public aid to parochial schools or students,[2] and religious activities within

[1]The *Lemon* test has been criticized by many of the Supreme Court Justices in their individual opinions (*see, Lamb's Chapel v Center Moriches Union Free School Dist.*, ____ US ____, 61 USLW 4549, 4553 [Scalia, J., concurring] [collecting cases]). Indeed, the test was not even invoked by the majority in *Zobest v Catalina Foothills School Dist.* (____ US ____, 61 USLW 4641), the Court's most recent Establishment Clause case.

[2]*Zobrest v Catalina Foothills School Dist.* (____ US ____) (sign language interpreter for parochial school student); *Aguilar v Felton* (473 US 402) (public school instructors teaching on premises of parochial schools); *Witters v Washington Dept. of Services for the Blind*

(Footnote continued on next page.)

public schools[3] (*see, Committee for Public Education v Nyquist*, 413 US 756, 772 [identifying categories]). This case falls into neither category: the law does not provide aid to a parochial school, and it does not prescribe religious practices for a public school.

(Footnote continued.)
(474 US 481) (aid to blind student attending sectarian college); *Grand Rapids School Dist. v Ball* (473 US 373) (similar); *New York v Cathedral Academy* (434 US 125) (reimbursement for recordkeeping and testing); *Wolman v Walter* (433 US 229) (textbooks, diagnostic services, remedial education, standardized tests, field trip transportation); *Roemer v Board of Public Works* (426 US 736) (grants to private colleges); *Meek v Pittenger* (421 US 349) (textbooks, instructional materials and various on-site services); *Committee for Public Education v Nyquist* (413 US 756) (funds for maintenance and repair, tuition reimbursement and tax benefits to parents); *Levitt v Committee for Public Education* (413 US 472) (funds for testing); *Hunt v McNair* (413 US 734) (revenue bonds for sectarian-affiliated universities); *Tilton v Richardson* (403 US 672) (federal construction grants); *Lemon v Kurtzman* (403 US 602) (teachers' salaries, textbooks, instructional materials); *Earley v DiCenso* (403 US 602) (salary supplements); *Board of Educ. v Allen* (392 US 236) (textbooks); *Everson v Board of Education* (330 US 1) (bus transportation).

[3]*Lee v Weisman* (112 S Ct 2649) (prayer at graduation ceremony); *Edwards v Aguillard* (482 US 578) (statute prohibiting teaching of evolution unless accompanied by instruction in theory of "creation science"); *Wallace v Jaffree* (472 US 38) (period of silence for "meditation or voluntary prayer"); *Stone v Graham* (449 US 39) (posting of Ten Commandments); *Abington School Dist. v Schempp* (374 US 203) (prayer and Bible reading at beginning of each school day); *Engel v Vitale* (370 US 421) (prayer); *Epperson v Arkansas* (393 US 97) (statute barring theory of evolution); *Illinois ex rel. McCollum v Board of Educ.* (333 US 203) (religious instruction by sectarian teachers); *see also, Lamb's Chapel v Center Moriches Union Free School Dist.* (____ US ____, 61 USLW 4549) (use of school premises by religious group); *Board of Educ. v Mergens* (496 US 226) (same); *Widmar v Vincent* (454 US 263) (same); *Zorach v Clauson* (343 US 306) (students released from public school classes for religious instruction).

This case also differs from previous Establishment Clause education cases in a more fundamental respect. Chapter 748 is not one of the myriad "governmental programs that neutrally provide benefits to a broad class of citizens defined without reference to religion" (*Zobrest v Catalina Foothills School Dist.*, ____ US ____, ____, 61 USLW 4641, 4644). Rather, the legislation was specifically designed to benefit Satmar Hasidim, who refuse to send their disabled children to integrated Monroe-Woodbury public schools. That the law is not part of a neutral, generally applicable program of state aid but instead was intended to benefit one religious group distinguishes this case, and calls for a different analysis.

The Religion Clauses of the First Amendment protect fundamental liberties and therefore apply to the States through Fourteenth Amendment's Due Process Clause (*Cantwell v Connecticut*, 310 US 296, 303). Although the Equal Protection Clause of the Fourteenth Amendment has been a bulwark against arbitrary government distinctions based on race (*Loving v Virginia*, 388 US 1, 11), gender (*Craig v Boren*, 429 US 190, 197-199), national origin (*Hernandez v Texas*, 347 US 475, 479), alienage (*Graham v Richardson*, 403 US 365, 371-372) and illegitimacy (*Trimble v Gordon*, 430 US 762, 766), it has been necessary to identify religion as a suspect classification for equal protection purposes; classifications along religious lines are strictly scrutinized in any event. "Just as we subject to the most exacting scrutiny laws that make classifications based on race, * * * or on the content of speech, * * * so too we strictly scrutinize governmental classifications based on religion" (*Employment Div., Dept of Human Resources of Oregon v Smith*, 494 US 872, 886 n2 [citations omitted]; *see*, 3 Rotunda and Nowak,

Treatise on Constitutional Law § 18.40, at 491-494 [2d ed 1992]).

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." (*Larson v Valente*, 456 US 228, 244.) It is thus axiomatic that the government "must maintain a course of neutrality among religious" (*Grand Rapids School Dist. v Ball*, 473 US 373, 382; *see also, Epperson v Arkansas*, 393 US 97, 104 ["The First Amendment mandates government neutrality between religion and religion"]; *Zorach v Clauson*, 343 US 306, 314 ["government must be neutral when it comes to competition between sects]).

The State is in greatest danger of straying from its required course of neutrality when it selects a particular religious sect for special privileges or burdens. " 'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders' " (*Church of the Lukumi Babalu Aye v City of Hialeah*, ____ US ____, ____, 61 USLW 4587, 4591, quoting *Walz v Tax Commission*, 397 US at 696 [Harlan, J., concurring]). Laws intentionally designed to hamper a group's religious practice violate the Free Exercise Clause unless they are narrowly tailored to a compelling government interest (*see, Church of the Lukumi Babalu Aye*, ____ US at ____, 61 USLW at 4594). By the same token, a law affording a benefit to one religious group violates the Establishment Clause if it too is not narrowly tailored to a compelling government interest.[4]

Larson v Valente (456 US 228) is a recent application of strict scrutiny to strike down a law under the Establishment

[4]A "benefit" addressed to one religious group may be related to Free Exercise values, and thus would not be constitutionally objectionable if sufficiently tailored. For example, a state may choose to exempt from criminal drug laws the possession of peyote by those whose

(Footnote continued on next page.)

Clause. In that case, a Minnesota statute imposed certain reporting requirements on charities but exempted religious organizations receiving more than half their contributions from members. The Court concluded that the *Lemon* test is intended "to apply to laws affording a uniform benefit to *all* religions" (456 US at 252; *see also, Corporation of the Presiding Bishop v Amos,* 483 US 327, 339), but that when a law expresses "a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality," (456 US at 246; *see also, Smith,* 494 US at 886 n2; *County of Allegheny v ACLU,* 492 US 573, 608-609; *Lynch v Donnelly,* 465 US 668, 687 n13.)

The *Larson* Court determined that the distinction between religious groups was a legislatively-sanctioned denominational preference, and thus the law was invalid unless it was justified by a "compelling governmental interest" and was "closely fitted to further that interest" (456 US at 247). The Court assumed that the statute was addressed to a compelling governmental interest—to protect citizens against abusive solicitation practices—but concluded that it was not "closely fitted" to those interests and therefore violated the Establishment Clause (456 US at 248-251).

Larson is of course distinguishable from the present case in that the Minnesota statute discriminated among religions while here the law is aimed simply at one religion. In my view, however, that distinction does not necessarily alter the analysis. A forbidden denominational preference can result from a

(Footnote continued.)
religious beliefs mandate sacramental use of that drug (*see, Employment Div., Oregon Dept. of Human Resources v Smith,* 494 US at 890). But if the exemption is too broad—permitting, for instance, members of the affected religious group to also possess and traffic in heroin and cocaine, that could, in my view, violate the Establishment Clause.

grant of benefits to one religious group as readily as discrimination among sects. In either case, the spector of official favoritism looms large, and the legislation should be carefully scrutinized.

II.

The creation of the carved-out school district is precisely the type of legislation that should be subjected to strict scrutiny. Although the law does not, on its face, make reference to the Satmar Hasidic sect, "[f]acial neutrality is not determinative" (*Church of the Lukumi Babalu Aye v City of Hialeah*, ____ US at ____, 61 USLW at 4590). No one disputes that purpose of the law was to create a new school district to provide disabled children of the Satmar faith with special education services in a segregated environment. Accordingly, in these circumstances the coterminality of the school district and the Village is of no moment (*see* dissent at 7): the law was "an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, *whose population are all members of the same religious sect.*" (Governor's Mem, 1989 McKinney's Session Laws of NY, at 2429 [emphasis added]). Without doubt, the law was designed to confer a benefit on a particular religious group.

Plainly this special interest legislation cannot be equated with the statutory scheme in *Zobrest v Foothills School Dist.* (____ US ____, 61 USLW 4641) (*see* dissent at 10, 12, 16-17). There, a parochial school student sought a sign language interpreter as "part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends" (____ US at ____, 61 USLW at

4644). Thus, the law was entirely neutral in relation to individual religions. Here, by contrast, the State engaged in *de jure* segregation for the benefit one religious group. Establishment of a public school district intentionally segregated along religious lines is a classic example of government action that must be "survey[ed] meticulously."

Turning then to the required strict scrutiny, I assume, for sake of analysis, that the "intractable problem" (Governor's Mem approving L 1989, ch 748, 1989 McKinney's Session Laws of NY, at 2429) of delivering special education services to Satmar children presented a compelling, secular government interest. Indeed, if protecting citizens against abusive solicitation practices may be considered a compelling (*see, Larson v Valente*, 456 US at 248), surely the provision of special education services qualifies.

Nevertheless, in my view the statute violates the Establishment Clause because the legislative response plainly went further than necessary to resolve the problem. While defendants and the dissent characterize the new school district simply as a "neutral site" for the delivery of special services (*see, Wollman v Walter*, 433 US 229, 248), this legislation, establishing an entirely new and separate school district, is significantly broader. Interestingly, although the dissent stresses that only a facial challenge is presented, it relies on how the statute has been inplemented—for example, that the new district presently provides only special education services. On this facial challenge, the Court must consider the full scope of the statute, which creates a new school district vested with "*all the powers and duties of a union free school district*" (L 1989, ch 748, emphasis added).

The impact of the Legislature's remarkable action of carving out a new school district coterminous with a religious enclave must not be assessed in a vacuum but measured

against history. For almost 40 years, ever since the landmark decision in *Brown v Board of Education* (347 US 483), government-sponsored segregation efforts have been unlawful (*see, e.g., United States v Scotland Neck City Board of Educ.*, 407 US 484, 489-490 [carving out new school district from existing one impermissible because it impedes desegregation]; *compare*, Education Law § 2590-b[3][a][iv]["heterogeneity of pupil population" a criterion in creating local school districts]; *Mississippi Univ. for Women v Hogan*, 458 US 718 [gender-based admissions policy unconstitutional]). Against this historical backdrop, the "symbolic impact" (*Grand Rapids School Dist. v Ball*, 473 US at 390, *supra*) of creating a new school district to serve the needs of a particular religious group cannot be underestimated.

The law's overbreadth, however, goes beyond symbolism. The impasse between Monroe-Woodbury and the Satmarer concerned only special education services for disabled children. Nevertheless, the Legislature responded by creating a new public school district vested with *all* the powers of a union free school district, which are vast.[5] Thus, for example, there is no legal impediment to the new district's opera-

[5]"The board of education of a union free school district, in addition to having in all respects the superintendence, management, and control of the educational affairs of the district, is given numerous more specific duties and powers. Thus, it is empowered and duty-bound to adopt bylaws and rules for its government as proper in the discharge of its duties; establish rules and regulations concerning the order and discipline of the schools; provide fuel, furniture, apparatus, and other necessaries for the use of the schools; prescribe courses of study; regulate the admission of pupils and their transfer between classes or departments; provide milk, transportation, and medical inspection of schoolchildren; provide home-teaching or special classes for handicapped and delinquent children; provide, maintain, and operate, under

(Footnote continued on next page.)

tion of a public school program for non-disabled children if it chose to do so. Manifestly, the delegation of such power to the new district demonstrates that the legislation exceeded the problem that engendered it.

Perhaps the best evidence that the Legislature's resolution was not closely fitted to the problem was the availability of more moderate measures to accomplish its goal (*see, Church of the Lukumi Babalu Aye*, ___ US at ___, 61

(Footnote continued.)
prescribed circumstances, cafeteria or restaurant service and other accommodations for teachers and other employees, pupils, and the elderly; and prescribe, and, when authorized, furnish, textbooks to be used in the schools. It is also authorized to purchase property and construct school buildings and facilities thereon; take and hold possession of school property; lease premises, and lease-purchase instructional equipment, for school purposes; sell and exchange school property; insure school property; sue to recover damages, and offer monetary rewards for information leading to the arrest and conviction of persons, for vandalism of such property; provide, where authorized, for lighting, janitorial care, and supervision of highway underpasses; alter former schoolhouses for use as public libraries; and explore, develop, and produce natural gas for district purpose. It is authorized to appoint teachers and librarians and to raise tax on the property of the district any moneys required to pay the salaries of teachers employed, and also to appoint committees to visit schools and departments under its supervision and report on their condition. Likewise the board is empowered to discharge district debts or other obligations. It has prescribed powers and duties with respect to self-insurance by the district, accident insurance of pupils, insurance against personal injuries incurred by school volunteers, and group insurance and workers' compensation coverage of teachers and other employees, and may, when authorized, withhold from employees' salaries sums to be paid to specified credit unions. Finally, the board possesses all the powers, and is subject to all the duties, of trustees of common school districts, and has all the immunities and privileges enjoyed by the trustees of academies in this state." (94 NY Jur 2d, *Schools, Universities, and Colleges*, § 99, at 152-157 [1991] [citations omitted].)

USLW at 4592). Accepting the parents' stated reasons for not sending their children to the public schools—psychological harm to the children from being thrust into a strange environment—then presumably the parents would be satisfied with a program directed to mitigating that trauma, without necessarily segregating the children.

Even if some sort of separate educational services were the only viable alternative, that could have been achieved without carving out a whole new school district. The Legislature could have, for example, enacted a law providing that the Monroe-Woodbury School District should furnish special education services to these children at sites not physically or educationally associated with their parochial schools. That would have satisfied the parents, and would supersede any residual claim by the District that New York statutory law precludes that action.

Such narrowly-tailored legislation would not, in my view, offend the Establishment Clause. In *Wollman v Walter* (433 US 229, 248), the Supreme Court held that "providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion." The Court had struck down previous efforts to provide remedial services on the premises of parochial schools (*see, Meek v Pittenger,* 421 US 349, 367-372), but as the Court explained in *Wollman,* the "dangers in *Meek* arose from the nature of the institution, not from the nature of the pupils" (*Wolman v Walter,* 433 US at 247-248; *see also, Grand Rapids School Dist. v Ball,* 473 US 373, 386-389; *Aguilar v Felton,* 473 US 402, 412). In the present circumstances, a law providing special education services to Satmar children at neutral sites can be considered closely fitted to a compelling government interest. Creating a new public school district cannot.

The foregoing analysis is consistent with, and indeed substantially overlaps, *Lemon's* second prong. The government may not make religion relevant to a person's political standing in the community (*Lynch v Donnelly*, 465 US 668, 687 [O'Connor, J., concurring]). If the government's response to a problem affecting a religious group is broader than reasonably necessary, it presents at least the perception of official favoritism or endorsement of that religion, in violation of *Lemon's* second prong (*see, County of Allegheny v American Civil Liberties Union*, 492 US 573, 592-594). By carving out a fully-empowered, whole new school district in these circumstances, the Legislature has also transgressed *Lemon*.

III.

This Court's decision returns the parties to square one. It is ironic that in the wake of the Legislature's creation of new school district for the Satmar, Monroe-Woodbury now argues that the "provision of secular instructional services to students of the same faith at a neutral site is constitutionally permissible." This approach by Monroe-Woodbury could well obviate the need for any further legislative intervention.

HANCOCK, J. (concurring):

I join in Judge Smith's opinion that Chapter 748 has a primary effect of advancing religion and for that reason violates the Establishment Clause. I agree with the majority that it is, therefore, unnecessary to decide whether Chapter 748 also violates the first or purpose test of *Lemon v Kurtzman* (403 US 602). However, if the Court were addressing

that issue, I would hold—as Supreme Court and, in my view, the Appellate Division majority do—that the statute also violates the first *Lemon* test (*see, Wallace v Jaffree*, 472 US 38, 56, 64 [Powell, J., concurring], 75 [O'Connor, J., concurring]).[1] As the Appellate Division majority pointed out:

> *The challenged statute, therefore, was designed * * * to provide * * * [special education] services within the Village so that the children would remain subject to the language, lifestyle and environment*

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[1]That the purpose of Chapter 748 was to obviate religious objections of the Satmarers seems plain from any reasonable analysis of the statute's intent from its wording and the statutory scheme. This is borne out by the legislative history and the record. *See, for example*, Memorandum to Governor Cuomo from Assemblyman Silver urging approval, stating that the bill provides "a mechanism through which [Satmar] students *will not have to sacrifice their religious traditions in order to receive the services which are available* to handicapped students throughout the state" (emphasis added); approval memorandum of Assembly sponsor Joseph Lentol stating that the "Hasidic jewish community *hold[s] firmly to its religious tenets*" (emphasis added); affidavit of Professor Israel Rubin (the Author of the book *"Satmar, An Island In The City"* quoted in *Board of Education v Wieder*, 72 NY2d 174, 180) to the effect that "[r]eligion and its preservation in the form interpreted and practiced in Satmarer occupies a central place in virtually all matters of importance", that the Satmar schools "* * * are meant to serve primarily as a bastion against undesirable acculturation", that "[b]asically it is religion which underlies the practice of gender segregation" and that the "private schools are, of course, among the places where gender segregation is strictly observed"; excerpts from book the *"Extraordinary Groups"* by Kephart and Zellner (St. Martin's Press 1991)—*e.g.*, "The ethnocentric attitude that they alone are capable of upholding the Torah solidifies the Hasidic belief that all other groups are inferior" and "The goal of the [Satmar] community is social isolation".

> *created by the community of Satmarer Hasidim and avoid mixing with children whose language, lifestyle and environment are not the product of that religion.* The dissent finds a secular purpose for the statute in that it would provide the handicapped children of the Village with the publicly supported, secular special educational services they need and to which they are entitled, but as previously noted those services were already available to all of the handicapped children of the Monroe-Woodbury District, including the handicapped children of the Village. Thus, *the only secular need for the statute recognized by the dissent did not, in fact, exist* (*Grumet v Board of Education*, 187 AD2d 16, 21 [emphasis added]).

Chapter 748 creates a special union free school district solely for the Village of Kiryas Joel so that its residents, almost all of whom are of the Satmarer Hasidic faith, may receive separate educational services for their handicapped children at public expense in place of the services which are already available to them as residents of the Monroe-Woodbury School District. Obviously, the purpose of Chapter 748 could not have been to meet the need of the residents of Kiryas Joel for special education services; such services were already available to them under State law as to all other residents of the Monroe-Woodbury School District. What is involved here is a special act of legislative and executive grace which makes available to the Kiryas Joel residents public education services to which they *would not otherwise be entitled* (*contrast, Zobrest v Catalina Foothills School District*, ___ US ___, ___ SCt ___, 1993 WL 209636 [where any child qualifying under a general government program for deaf children was entitled to benefits as a matter of right "without regard to the 'sectarian-nonsec-

tarian, or public-nonpublic nature' of the school the child attends" (*id.*, 1993 WL 209636, at p 5)]). In sum, Chapter 748 was enacted solely as an accommodation, not as the fulfillment of an entitlement.

Was the purpose of this accommodation anything other than religious? Unquestionably, the accommodation was to meet a requirement peculiar to the residents of Kiryas Joel—that their children be permitted to associate only with children of the Satmar Hasidic sect. As I read the record, there is no dispute: (1) that the mandate of a separate and isolated existence is an important tenet in the Satmar Hasidic religious doctrine and inherent in the Satmar culture and way of life; or (2) that it is particularly important that this requirement of separation be strictly observed in the upbringing and education of Satmar children.

Creating the special School District which encompasses only the Village of Kiryas Joel achieved this accommodation; special education could be furnished to the children of Kiryas Joel through their own exclusive program inside the village limits where the children would mix only with the children of the Satmar faith. That a statute which is clearly intended to meet the special religious requirements of a particular sect is a statute having a religious purpose seems self-evident. If more is needed, it may be found in the record and the Legislative history of Chapter 748 (*see*, bill Jacket, ch 748, L 1989; *see also*, Lentol Memorandum and Silver Memorandum, supra, n 1), and, indeed, in our prior decision concerning the special education for the children of this very village (*Board of Education v Wieder*, 72 NY2d 174, 179-180).

It is argued, however, that the legislative purpose of Chapter 748 was to obviate the emotional and psychological trauma of the children upon being taken from the isolation of their unique community and placed with other children

whose ways are different from theirs, and that, thus, the statute has a secular purpose. But, there is nothing in the statute or its legislative history suggesting that the enactment of Chapter 748 was related to the psychological stress of the children or prompted by anything other than the well-meaning desire to comply with the religious requirement of keeping the Satmarer children separate from other children, concededly the cause of whatever emotional or psychological effect the children may have suffered. Indeed, the Appellate Division noted:

> The record, however, contains uncontradicted evidence of a direct link between the language, lifestyle and *environment of the community's children and the religious tenets, practices and beliefs of the community.* Based upon similar evidence and in a similar procedural posture, the Court of Appeals had little difficulty finding such a connection. " 'With an apparent over-all goal that *children should continue to live by the religious standards of their parents,*' Satmarer want their school to serve primarily as a 'bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and, in the case of girls, as a place to gather knowledge that will need as adult women' " (*Board of Education v Wieder, supra,* at 180 [emphasis added]) (*Grumet, supra,* at 23, [emphasis added]).

The question is not whether some legislative solution for prescribing psychological services for the Satmar children could be devised that would have a secular purpose and thus meet the first *Lemon* test. We are concerned only with the legal question of the purpose of the specific legislation before us. Chapter 748 establishes what amounts to a pri-

vate school to furnish special education services at public expense to the residents of Kiryas Joel in order to accommodate their religiously mandated requirement of separation for their children. It does so through the extraordinary means of creating within an existing school district another co-existing district designed only to include a village whose residents are almost exclusively of a particular religious sect.

If a statute does not have a clearly secular purpose, it fails the first or "purpose" test of *Lemon* (*see, Wallace v Jaffree*, 472 US 38, 56). Justice Powell's explanation of the first *Lemon* test in his *Wallace* concurrence is especially apt here:

> The first inquiry under *Lemon* is whether the challenged statute has a 'secular legislative purpose.' *Lemon v Kurtzman, supra*, at 612. As Justice O'Connor recognizes, this secular purpose must be 'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a 'sham.' *Post*, at 75 (concurring in judgment). In *Stone v Graham*, 449 U.S. 39 (1980) (per curium), for example, we held that a statute requiring the posting of the Ten Commandments in public schools violated the Establishment Clause, even though the Kentucky Legislature asserted that its goal was educational (*Wallace, supra*, at 64 [Powell J., concurring]).

But for the Satmarers' religious mandate of separation, no statute and no governmental expenditures for special education services for the residents of Kiryas Joel would have been necessary. In short, the accommodation of the Satmarers' religious requirements " 'was and is the law's [only]

reason for existence' " (*Wallace, supra*, at 75 [O'Connor J., concurring], quoting *Epperson v Arkansas*, 393 U.S. 97, 108).

Realistically, can the legislative creation of the Kiryas Joel School District to make special additional educational services available in order to obviate the religious objections of its residents have a purpose other than religious? As a matter of common sense—given the wording of the statute, its apparent intent and the absence of any reference to other than a religious purpose in the legislative history—the answer must be no.

Assuming, however, that Chapter 748 can be construed as having a clearly secular purpose (*see, Wallace, supra* at 56), I believe that, in its effect, it cannot be anything but a government action which unequivocally endorses religion in violation of the second *Lemon* test (*see, Wallace*, at 69 [O'Connor J., concurring]). Not only have the legislative and executive branches of government acted for the special benefit of a particular religious sect in creating the Kiryas Joel School District, but their action entails state aid which will relieve the private Talmudic academies and the residents of the Kiryas Joel Village of the financial burdens of providing required special education for the Satmarer children.[2] Thus, Chapter 748—like the money grants for maintenance and repair, the tuition reimbursement grants, and the income tax benefits struck down in committee for in *Com-*

[2]The Budget Report of the Bill which was later enacted as Chapter 748 contains the following:

> Based on local wealth data provided by the Monroe-Woodbury school district, and assuming that the 100 special education pupils in the Kiryas Joel school district will be placed in programs qualifying for the high sqst component of excess cost aid, *we estimate a new Kiryas Joel school district budget of*

(Footnote continued on next page.)

mittee For Public Education v Nyquist (413 U.S. 758)—constitutes the sort of state financial assistance for sectarian education which has the effect of furthering the religious mission in contravention of the second *Lemon* test (*see, School Dist. of Grand Rapids v Ball*, 473 US 373, 393-395; *Meek v Pittenger*, 421 US 349, 364-366; *Aquilar v Felton*, 473 U.S. 402, 422 [O'Connor J. dissenting]). As the Supreme Court recently stated in regard to its holdings in *Meek* and *Ball*:

> [T]he programs in *Meek* and *Ball*—through direct grants of government aid—relieved sectarian schools of costs they otherwise would have borne in educating their students. See *Witters [v Washington Dept of Services for the Blind*, 474 US 481] at 487 ("[T]he State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State")— (quoting *Ball, supra*, at 394). For example, the religious schools in *Meek* received teaching material and equipment from the State, relieving

(Footnote continued.)

about $1.3 million and new State aid of about $400,000-450,000. This would leave a local tax bill of about $900,000. Since Monroe-Woodbury attributes about $1.4 million of its tax base to the Village of Kiryas Joel, *it appears that the Village's tax payers will benefit from both new State Aid and lower, local property taxes as a result of the creation of the new district.* Also based on data supplied by Monroe-Woodbury (and current data available from the State Education Department), *we estimate that the loss of property and income wealth attributed to the Village of Kiryas Joel will make Monroe-Woodbury poorer to the extent that it will* receive operating aid on a formula basis rather than on save-harmless, due to its then lower wealth, would not occur until the 1991-92 school year, we project such State aid increases would amount to 1.4 million [emphasis added].

them of an otherwise necessary cost of performing their educational function. 421 U.S., at 365-366. "Substantial aid to the educational function of such schools," we explained, "necessarily results in aid to the sectarian school enterprise as a whole," and therefore brings about "the direct and substantial advancement of religious activity." *Id.*, at 366. So, too, was the case in *Ball*: The programs challenged there, which provided teachers in addition to instructional equipment and material, "in effect subsidize[d] the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." 473 U.S., at 397. "This kind of direct aid," we determined, "is indistinguishable from the provision of a direct cash subsidy to the religious school." *Id.*, at 395. (*Zobrest v Catalina Foodhills School District, supra*, 1993 WL 209636, at 6).

BELLACOSA, J. (dissenting):

This case arises from a community's search for special education services on behalf of approximately 200 handicapped children who, as Satmarer Hasidic Jews, reside with their families in the Village of Kiryas Joel in Orange County, New York. A decade of controversy of virtually epic proportions is reflected in litigation at various levels of State and Federal courts and in unsuccessful efforts by various protagonists to forge a local, secular, public education program for the pupils with special needs of the Village of Kiryas Joel. The State of New York in 1989 enacted a law which held the promise of a Solomon-like solution.

Although invested with a presumption of constitutionality, that statute is judicially nullified as a violation, on

its face, of the Establishment Clause of the First Amendment of the United States Constitution. Because I believe that the Court has erected a reverse presumption of unconstitutionality and because I agree with Justice Levine, dissenting at the Appellate Division, that the law is not facially defective, I respectfully dissent and vote to reverse.

I.

Since 1977, the Village of Kiryas Joel has been an incorporated (since 1977) municipality in the Town of Monroe, Orange County, New York, populated by Satmarer Hasidic Jews. The lifestyle of the community—including distinctive dress, language and customs—was described by this Court in *Board of Education v Wieder* (72 NY2d 174, 179-180). Before the legislation at issue, all school children of the Village, for public education purposes, were within the jurisdiction of the Monroe-Woodbury School District. Those pupils in the Village without special needs, however, receive their schooling in Satmarer Hasidim parochial schools. They are not involved in this litigation.

The challenged legislation evolved out of a series of court cases involving disputes between the residents of the Village and the Board of Education of the Monroe-Woodbury School District (which is not aligned as a party in this lawsuit with the Kiryas Joel Board of Education) concerning the provision only of special education services to the handicapped children of the Village. In 1988, when *Board of Education v Wieder* (*id.*) was decided by this Court, the Monroe-Woodbury School District had offered the Village's handicapped students the special education services to which they were entitled under Federal and State law only at the District's public schools. The Satmarer Hasidic residents of the Village demanded a neutral site within the

Village. This Court held that the courts could not mandate that the location of the services be either the District's public schools or a neutral site within the village, though this Court also unanimously urged that efforts be undertaken by the protagonists to secure a neutral site and solution *Board of Education v Wieder*, 72 NY2d *supra*, at 189 fn3).

Both sides nevertheless persisted in their diametrically opposed positions, and the "true subjects of this controversy" (*id.*, at 179), the handicapped Satmarer children, received no special education. The Satmarer Hasidim removed their special-needs children from the Monroe-Woodbury School District's public schools, after an experimental effort and period, because they felt that the District's failure to accommodate their distinct language and cultural needs had a "major adverse effect on [their special-needs children's] educational progress" and on the children's psychological and emotional well-being. Ultimately, the New York State Legislature acted to end the long standoff.

Chapter 748 of the Laws of 1989 established "a separate school district in and for the Village of Kiryas Joel, Orange County". The statute granted the new school district the powers of a union free school district under the State Education Law, and provided that the district shall be controlled by a board of education, elected by the qualified voters of the Village. The Monroe-Woodbury Board of Education unanimously supported the legislation, urging the Governor to sign the bill "because it will allow for the proper education of the Kiryas Joel handicapped children. The creation of a separate school district will serve to reduce community tension and lead to productive relationships." Governor Cuomo approved the legislation, effective July 1, 1990, commenting in the official Approval Message that "[m]y Counsel [] advises that the bill is, on its face, constitutional.

I am persuaded by my Counsel's view. * * * [T]his bill is a good faith effort to solve this unique problem" (Approval Message of the Governor, 1989 NY Legis Ann at 325).

The new school district operates a public school which provides education only to the district's children with special needs. Under the statute, the district must operate in a secular manner. The superintendent of the school, who is not Hasidic, served for twenty years in the New York City public school system, where he acquired expertise in the area of bilingual, bicultural, special education for handicapped children. The teachers and therapists, all of whom live outside the Village, teach mixed classes of boys and girls a wholly secular curriculum of subjects, such as reading, writing, arithmetic, music and physical education. The statute requires the school to comply with all State laws, rules and regulations affecting public education, including a prohibition against any form of discrimination.

II.

The New York State School Boards Association ("NYSSBA") and two of its officers instituted this action in January 1990 against the New York State Education Department and various State officials, seeking a declaration of unconstitutionality of the statute. The Kiryas Joel and Monroe-Woodbury Boards of Education intervened as defendants. Although the parties stipulated to a discontinuance of the action as to the defendant State officials, the Attorney General has continued to defend the constitutionality of Chapter 748 (*see*, Executive Law §71). The organizational plaintiffs (NYSSBA and Messrs. Grumet and Hawk, in their capacities as NYSSBA officers) were ultimately found to lack standing to challenge the statute, an aspect of the case

not before us. However, the two named individuals remain as taxpayers-plaintiffs-respondents.

Plaintiffs moved and defendants cross-moved for summary judgment on facial grounds only, inasmuch as no discovery or any other factual inquiry in this case has been undertaken. Supreme Court, Albany County, held that Chapter 748, on its face, violated all three prongs of *Lemon v Kurtzman* (403 US 602) and therefore violated the principle of separation of church and state. The Appellate Division affirmed, holding that Chapter 748, on its face, violates at least the second prong of the *Lemon* test because its primary effect is the advancement of religion. This Court also strikes the law down on only prong two, the primary effect aspect of *Lemon*, although the Concurrences advance newly refined additional bases for invalidation.

Plaintiffs press their argument before this Court that Chapter 748 violates all three prongs of the *Lemon* test. Although defendants-appellants proffered a secular purpose for the legislation, plaintiffs characterize it as a "sham" (Supreme Court referred to it as a "camouflage [of] secular garments"). Plaintiffs allege that the purpose of the statute is to cater to the "religious separatist tenets" of the Satmar Hasidim. They also argue that Chapter 748 has the primary effect of advancing the religious tenets of the Satmar Hasidim, because the statute allows them to maintain their separatism. Finally, they urge that it constitutes a State endorsement of religion.

Defendants-appellants reject plaintiffs' claims on the ground that plaintiffs have not met their heavy burden of rebutting the presumptive facial constitutionality of Chapter 748 of the Laws of 1989 beyond a reasonable doubt. Defendants also demonstrate, to the contrary, that the statute should survive facial scrutiny on all three branches of the

Lemon test and urge that it should not be struck down without evidentiary development and as-applied analysis.

III.

No one disputes that the Legislature has the fundamental power to create a union free school district within the boundaries of a previously existing school district to facilitate the provision of public education to a particular group of students (*see, e.g.*, Town of Greenburgh, UFSD No. 13, Chapter 559 of the Laws of 1972; Town of Mt. Pleasant UFSD, Chapter 843 of the Laws of 1970; Granada School District Act, Chapter 92 of the Laws of 1972). Plaintiffs concede that approximately 20 such school districts have been created by acts of the Legislature.

Nevertheless, plaintiffs predicate their challenge, to what is otherwise an entirely secular act of public education administration effected by the other two Branches of State government, on their sectarian interpretation of the unique, overlapping cultural and religious characteristics of the population of the Village of Kiryas Joel and its identical geographical boundaries with the new School District. They assert that the citizens of Kiryas Joel are exclusively Satmarer Hasidim and will remain as such. However, no claim is made of any alleged restrictive covenants among the Village's property owners, or of any alleged irregularity in the conduct of municipal or school district elections, or of any exclusion of non-Hasidim in any respects of governance, employment or availment of educational services. Indeed, there is no showing that non-Satmarer Hasidim students are precluded from attending and taking advantage of this special education program. What plaintiffs assert, in sum, substance and effect, is that because the municipality and school district share identical borders and frame an enclave

currently populated only by Satmarer Hasidim, the very existence of the public school district by authorization of the Legislature and Executive constitutes, on its face, an establishment of religion prohibited by the United States Constitution. The logical and inexorable extension of this canon would dictate the extinguishment of the Village itself for the identical infirmity.

IV.

To evaluate plaintiff's claims under the currently prevailing *Lemon* test, the Court must examine the purpose and effects of the legislation, as well as the possibility of government entanglement resulting from the legislation (*see, NYS School Bds. Assn. v Sobol*, 79 NY2d 333, 338-339). While many personal expressions of the Justices of the United States Supreme Court question the vitality of *Lemon* (*see, Lamb's Chapel v Center Moriches UFSD, et al*, ____ S Ct ____, 61 USLW 4549, 4553-4554 [decided 6-7-93], Scalia, J., concurring), the institutional postulate of that Court remains unchanged—*Lemon* controls (*id.*, at 4552 and n 7, White, J., Opn of the Court). However, the analysis in an Establishment Clause case, decided nine days later, abstains from discussion of the *Lemon* test (*see, Zobrest v Catalina Foothills School District*, ____ S Ct ____, 61 USLW 4641 [decided 6-16-93]).

The first *Lemon* prong—that "the statute must have a secular purpose" (*Lemon v Kurtzman, supra*, at 612)—is breached only if the enactment was "motivated *wholly* by [a religious] purpose" (*Bowen v Kendrick*, 487 US 589, 602 [emphasis added]; *see, Wallace v Jaffree*, 472 US 38, 56). Chapter 748 was enacted for the stated purpose of allowing only handicapped pupils of the Village of Kiryas Joel to receive a publicly supported, secular special education to

which they are entitled (*see*, Governor's Mem 1989 Legis Ann, at 324-325). This objective satisfies the secular purpose prong of the *Lemon* test.

Next, in considering the facial attack, the Court seems satisfied that a third-prong violation, excessive entanglement, has not been demonstrated. The Kiryas Joel public school established for this Village is not a "pervasively sectarian environment" of the type which generally raises the entanglement problem (*see, e.g., Aguilar v Felton*, 473 US 402; *Meek v Pittinger*, 421 US 349). The education program is exclusively and thoroughly nonsectarian; the staff is secular; all regulatory monitoring is of the traditionally-accepted educational variety and is designed to assure that the secular staff adheres to the State-approved secular curriculum (*see generally, Grumet v Board of Education of the Kiryas Joel Village School District*, 187 AD2d 16, 36-37 [Levine, J., dissenting]).

The Court's dispositive analysis turns ultimately on only the second *Lemon* prong, the "effects" test. Defendants contend that the educational services offered by Monroe-Woodbury School District prior to the enactment of Chapter 748 were inadequate, because the services did not accommodate "the distinct language and cultural needs of the handicapped children" in the Village, and the primary effect of the legislation is to remedy that problem. In bold dichotomy, plaintiffs' central argument that the primary effect of the statute involves "the State in sponsorship of Satmar separatist precepts" is adopted by the Court, contrary, in my view, to the spirit of the holding and analysis of *Zobrest*. The primary effect benefits the handicapped students in a secular manner; only an "attenuated" effect reaches the religion of their community.

As initially articulated, the effects prong demands of legislation that "its principal or primary effect must be one

that neither advances nor inhibits religion" (*Lemon v Kurtzman, supra*, at 612). In subsequent application, the Supreme Court has augmented this restriction to require that any nonsecular effect be remote, indirect and incidental. Courts attempting to apply the "effects" test must also grapple with the related subsidiary concern of whether the governmental action constitutes an "endorsement" of religion. As Justice Kennedy recently observed, however, the Supreme Court's unsettled jurisprudence in the area of possible government "endorsement" of religion leaves this sub-branch of the *Lemon* test somewhat suspect (*see, Lamb's Chapel v Center Moriches UFSD, et al.*, ____ S Ct ____, 61 USLW 4549, 4553 [decided 6-7-93] [Kennedy, J., concurring], *supra*).

The Supreme Court has used "endorsement" as a factor for assessing whether an impermissible purpose or effect infects a challenged law (*see, e.g., Grand Rapids School Dist. v Ball*, 473 US 373, 389); however, the meaning of "endorsement" is not "self-revealing" (*compare, Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, ____ S Ct ____, 61 USLW 4587, 4598 [Souter, J., concurring]).

Unraveling whether a particular governmental action runs afoul of this test is a tricky and complicated process. Justice O'Connor initially proposed the "no endorsement" test in *Lynch v Donnelly* (465 US 668, 691-693 [O'Connor, J., concurring]). Its protean—and controversial—nature is evidenced by the fact that in that case she found that a municipality's display of a Christmas creche was not an endorsement of religion. In her view, the printing of "In God We Trust" on coins and the opening of court sessions with "God save the United State and this Honorable Court" were also not constitutionally offending endorsements (*id.*, at 693).

Justice O'Connor in *Wallace v Jaffree* (472 US 38, *supra*) offered an "objective observer" refinement to the endorsement factor. Much like the reasonable person embodied in the negligence standard, the so-called objective observer is expected to form a perception on the basis of familiarity with "the text, legislative history, and implementation of the statute" as to whether a particular State action constitutes an endorsement of religion or of a particular religious belief (*id.*, at 76). Moreover, any objective observer would presumably also be "acquainted with the Free Exercise Clause and the values it promotes" (*id.*, at 83). Thus, the objective observer should be aware of the overlap and tension between the Establishment and Free Exercise Clauses, and the permissibility of accommodation to Free Exercise concerns (*id.*). To be sure, the Supreme Court has not yet adopted Justice O'Connor's nuance for detecting an alleged endorsement, but neither has it otherwise clarified the method and criteria for unveiling an impermissible endorsement (*see, e.g.*, Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Enforcement" Test*, 86 Mich L Rev 266).

Reasonable minds may differ as to whether the actuality or the symbolism of the State's facilitation of publicly-administered special education to handicapped pupils of an incorporated municipality is an endorsement of the children's or their parents' religion. To allow for no reasonable doubt on a facial review and to decide this case as a forbidden establishment of a religion is at least arguable. "Objective observers" could not, in my view, so definitely conclude or perceive this situation as an establishment of a religion, without inspiring some inquiry as to whether their views perhaps suffered from a predisposed hostility to religion in the constitutional debate sense. Truly objective observers should be able to conscientiously accept this legisla-

tion as secular, neutral and benign within the reasonable doubt spectrum (*see*, Tribe, American Constitutional Law, 1176, 1187-1190, 1221). For comparative analysis, as an example, one might view the direct aid to the handicapped pupil in a parochial school in *Zobrest* as the scaling of the wall of separation; yet, it was held constitutional under a broadly applicable analysis. In contrast, in this case the State stayed safely off and away from the forbidden wall by aiding a group of handicapped pupils in a specially created public school; yet, the Court here declares the legislative act unconstitutional. I find this perplexing, to say the least.

This Court has said that "[g]overnmental action 'endorses' religion if it favors, prefers, or promotes it" (Majority opn, at 11; *see also, New York State School Bds. Assn v Sobol, supra*, 79 NY2d, at 339). In applying that proposition at face value, the Court concludes that Satmarer Hasidism is impermissibly favored, preferred or promoted by Chapter 748. I disagree because context is key (*see, New York State School Bds. Assn. v Sobol, supra*). Here, no message of endorsement for Satmar theology or its particular separatist tenets need necessarily or can fairly be inferred, either by objective third parties or by the protagonists themselves. On the other hand, it can fairly be said that the People of the State of New York, as a whole, gain a compelling benefit in the compromise solution achieved here. The New York commonweal is primarily advanced. It should not be forgotten or overlooked that the long-simmering, underlying dispute spilled over the borders of the Village into the broader surrounding community, and resulted in a complete impasse. The legislation, judicially dissolved in this case, was the negotiated denouement at the highest policy level available in a democracy, the State Legislature. As Professor Tribe has noted, "[l]eaving room for legislatures to craft religious accommodations recognizes that *they may be in a*

better position than courts to decide when the advantages of strict neutrality are overstated" (Tribe, American Constitutional Law §14-7, at 1195 [2d ed] [emphasis added]). Former Justice Brennan emphasized this important nuance by observing that "even when the government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion" (*Marsh v Chambers*, 463 US 783, 812 [Brennan, J., dissenting]).

The incidental, "attenuated" benefit to the minority Satmar viewpoint supports this State's rich pluralistic tradition and does not diminish, but rather enhances, the common good. I conclude that the incidental benefit to the Satmar Hasidim citizens does not render the State's legislative solution facially impermissible because:

> [i]t does not follow, of course, that government policies with secular objectives may not incidentally benefit religion. The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur. *See, Mueller v Allen*, 436 US 388, 393, 103 S Ct 3062, 3065, 77 L.Ed.2d 721 [1983]. (*Texas Monthly, Inc. v Bullock*, 489 US 1, 10.)

The unmistakable reality of this case is that the stricken legislation tried to create a secular public school for pupils with special education needs. The Majority concludes that the effort fails. Yet, the new public school district offers programs and services at odds with many basic precepts of

Satmarer Hasidism. Secularism itself is antithetical to Hasidism, yet secularism is the *quid pro quo* imposed by the State for these Village residents to avail themselves in this way of State-regulated special educational services for their handicapped youngsters. Though the Legislature bent over backwards, as a last resort, to address the legitimate special education needs of the Satmarer students, it did not bend to the theology of their families or community (*see generally,* Tribe, American Constitutional Law §14-7, at 1195 [2d ed]). For its effort, the Legislature and Executive and the citizens who sought recourse through the democratic process are deemed religious gerrymanderers and educational segregationists (*see,* Concurring Opn, Kaye, Ch.J., at 5, 11; *contrast, Mtr. of Wolpoff v Cuomo,* 80 NY2d 70, 78-80).

On the other hand, there has been substantial approbation from the surrounding and affected non-Satmarer community for the fairness and equity of the State providing a secular solution for what had previously proved to be an intractable local dispute. Indeed, defendant-intervenor-appellant Board of Education of the Monroe-Woodbury Central School District has not regarded the legislation as a repudiation of the secular educational principles for which it previously and steadfastly fought as litigant against the Satmarer Hasidim, or as an approval of the separatist tenets of the Satmar. Although it was unable to achieve a solution on its own, its present amity is noteworthy (*Board of Education v Wieder,* 72 NY2d 174, *supra*).

As the Supreme Court noted in *Wolman,* "[t]he fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in *Meek [v Pittinger]*" (*Wolman v Walter,* 433 US 229, 247). "The purpose of the program is to aid school children * * * * Certainly the Establishment Clause should not be seen as foreclosing a practical response to the logisti-

cal difficulties of extending needed and desired aid to all the children of the community" (*id.*, at n 14). The United States Supreme Court built on those comments in *Zobrest v Catalina Foothills School District* (___ S Ct ___, 61 USLW 4641 [decided 6-16-93], *supra*) by observing that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit" (*id.*, at 4643, Rehnquist, Ch.J., Opn of the Court). That is the substantive effect of this legislation. This Court, nevertheless, objects as to the form selected and prescribed by this State's Legislature and Executive.

In fact, *Board of Education v Wieder* (72 NY2d 174, *supra*) aspirationally urged the provision of services separately to the handicapped students of Kiryas Joel, if Monroe-Woodbury School District could find a way to do so (*id.*, at 189, fn 3). *Wolman* was offered as authority and a guidepost of significant promise for the Legislature in promulgating its ultimate substantive result (*id.*). Ironically, the Legislature's action is criticized as radical and not sufficiently tailored (Concurring Opn, Kaye, Ch.J., at 1, 11-12).

I conclude that strong and sufficient authority and analysis, past and immediate, support the view that the principal or primary effect of the challenged legislation does not advance religion in this unique context, and that no endorsement of religion may be fairly inferred.

V.

This latest litigation reaches this Court by appeal as of right on constitutional grounds from the affirmance of summary judgment granted to plaintiffs in the Supreme Court

declaring Chapter 748 facially unconstitutional. In that procedural framework, of course, disputed inferences or factual issues must be viewed in the light most favorable to defendants and challenges on an as-applied basis should await a future day of reckoning. Undeniably, a sharp Sword of Damocles hangs over the officials charged with implementation of this statute. As Governor Cuomo observed, "[o]f course this new school district must take pains to avoid conduct that violates the separation of church and state * * * * I believe they will be true to their commitment" (Approval Message of the Governor, 1989 NY Legis Ann at 325, *supra*).

The concerns about the degree under which this new school district actually operates within the direction and control of elected community leaders who share a particular religious persuasion are issues of applied fact, not law. A similar fact mix is presented as to whether the creation of such a school is rooted solely in the religious preferences of the Satmar or in their cultural, essentially secular, needs and rights, which are entitled to an enlightened and permissible societal accommodation. The needs, at least as emphasized by defendants, stem from the additional emotional impacts on Satmarer handicapped students. Defendants note that if these students—already special—are compelled to leave the Village and attend special education instruction in the Monroe-Woodbury public schools, they are met with a negative and hostile environment in which their language, customs and appearances are regarded as oddities, at best. Justice Levine sagely observed in dissent at the Appellate Division that deeply troubling concerns persist as to whether the courts are able, even in trial, to delve into, trace and ascertain the "true" Satmar theology and precepts (*Grumet v Bd. of Education of the Kiryas Joel Village School Dist., supra,* 187 AD2d, at 29 [Levine, J., dissenting]; *see also,* Tribe,

American Constitutional Law §14-11, at 1231 [2d ed]). The bottom procedural line is that this Court has plainly disfavored summary disposition when faced with similarly sensitive and complicated questions of fact (*see, Ware v Valley Stream High School*, 75 NY2d 114, 131).

VI.

Notably, the record in this case documents sharp contrasts between the manner in which the secular special educational services are provided in the Kiryas Joel public school and the distinctive religious lifestyle of the Village. English is the language of instruction within the school; Yiddish is the medium of communication within the Village. In contrast to the method of education at the sectarian schools in the Village, male and female students at the public special education school are grouped together for instructional purposes at the special school; instructional materials are not based upon the sex of the student being instructed; female employees are not prohibited from exercising authority over male employees; the physical appearance of the building is secular, including the significant absence of mezuzahs on the doorposts; and the dress of the employees is secular in appearance. The democratically-elected Board of Trustees of the Kiryas Joel Village School District has strained to create a nonsectarian educational environment which is faithful to the secular command of the statute. Plainly, this effort is indicative of the secular compromise the Hasidim community was willing to absorb to allow the special education needs of their children to be met within a public, neutral, nondenominational setting.

The judicial nullification of this latest phase of the long-standing tug-of-war prompts the larger question whether control over a public school may ever be placed in the hands

of secularly-elected individuals who have a common set of religious beliefs. Does a forbidden "symbolic union" always and automatically emerge? The three Opinions of the Majority suggest so, but I emphatically think not. It is important and fundamental to understand that the establishment of a union free school district geographically identical to an incorporated municipality, in the context of the constitutional and statutory guarantees of public education, neutral religious rights and nondiscrimination provided by both Federal and State law, should not be stigmatized as aid to a particular denomination, simply because the inhabitants of that municipality are predominantly or even exclusively members of that denomination.

For the Court to reject the Legislature's answer with a blunt "No" deprives the citizens of Kiryas Joel of certain educational prerogatives in contravention of their fundamental right to self-governance. Their free exercise of religion is also inextricably implicated and compromised, simply because they have chosen to live and believe in a particular way together in an incorporated village. This dogmatic "No" at the end of a long, difficult odyssey once again strips the special-needs children of their protected public education rights. In effect, their Free Exercise rights are burdened by draping a drastic, new disability over the shoulders of young pupils solely on account of the religious beliefs of their community (*see, Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, ____ S Ct ____, 61 USLW 4587 [Scalia, J., concurring], *supra; see also, McDaniel v Paty*, 435 US 618).

The facile notion that the cultural, psychological and secular differences of the special-needs children of Kiryas Joel cannot be classified as anything but religious in nature should be rejected as alien to our most cherished traditions and values. The cultural disposition and circumstances of

handicapped Satmarer children should not disqualify them from government attention on the bare conclusion that their different-ness is derived solely from their religious beliefs and, therefore, is constitutionally inseparable from their religiosity. A culturally diverse Nation, which proclaims itself under a banner, *E Pluribus Unum,* should not tolerate such a self-contradiction, for to penalize and encumber religious uniqueness in this way, in effect, strikes the "E Pluribus" and leaves only the "Unum."

As Justice Levine cogently cautioned in his dissent at the Appellate Division:

> In effect, the majority is saying that the State may not respond to a bona fide *secular interest* of the Satmarer Hasidim, i.e., the psychological and emotional vulnerabilities of their handicapped children, because the culture bringing about the insecurities of these youngsters was "molded" by Satmar religious precepts. In a real sense, then, the majority is thus holding that merely because of some link between their religion and a legitimate secular need, the Satmarer are disqualified from receiving from the State the purely secular services to meet that secular need (*Grumet v Board of Education of the Kiryas Joel Village School District, supra,* 187 AD2d at 29 [Levine, J., dissenting]).

Courts have no choice but to enter the struggle to examine the evidence and demarcate between a religious practice and the secular cultural consequences of that practice in a pluralistic society after the Legislature has persevered in doing so. If the courts refuse to do so and insist instead on overturning legislation, such as that at issue here, because it is asserted to be nothing more, on its face, than a forbidden

accommodation to the exercise of religious "separatism," then frank confrontation with the values and rights under the Free Exercise Clause becomes unvoidable. Without a doubt, the two clauses—Establishment and Free Exercise—are in some historical and modern natural tension, and the overlap of the clauses may be said to create a "zone of permissible accommodation" (Tribe, American Constitutional Law §14-7, at 1194 [2d ed]; *see also, Ware v Valley Stream High School District*, 75 NY2d 114, *supra*). Justice Souter (with Justices Stevens and O'Connor joining) recently reiterated this principle in the concurring Opinion in *Lee v Weisman* (___ US ___, 112 S Ct 2649):

> That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. *See, e.g., Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos*, 483 US 327 [1987]; *see also, Sherbert v Verner*, 374 US 398 [1963]. Contrary to the views of some, such accommodation does not necessarily signify an official endorsement of religious observance over disbelief (*Lee v Weisman, supra*, at 2676-2677).

Chapter 748 of the Laws of 1989 could be viewed as a reasonable accommodation of the Satmarer's free exercise of religion because it alleviates, as a last resort, their lack of choice in either having to forego the substantial benefits of publicly supported special educational services for their handicapped children or having to abandon their religious principles. That accommodation in these circumstances, on

a facial attack and analysis, is supportable as a permissible deference to the historical and evolved predominance of Free Exercise protection in First Amendment constitutional adjudication.

I would therefore reverse and not declare Chapter 748 unconstitutional on its face. The judicial nullification of the democratic prerogatives and solution for this intractable Town-wide controversy is not justified. Instead, it seems to spring from a reflexive veneration of a symbolic metaphor that sacrifies concededly-necessary special education services of a small group of handicapped pupils. A real wall of separation thus arises and solidifies to a mythic height and density.

Order modified, with costs to plaintiffs, in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Smith. Chief Judge Kaye and Judges Simons and Hancock concur, Chief Judge Kaye and Judge Hancock in separate concurring opinions. Judge Bellacosa dissents and votes to reverse in an opinion in which Judge Titone concurs.

Decided July 6, 1993

APPENDIX C—Opinion and Order of the Appellate Division, Third Department.

SUPREME COURT—APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

LOUIS GRUMET, Individually and as Executive Director of the New York State School Boards Association Inc., *et al.*,

Respondents,

v

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT *et al.*,

Appellants.

Decided and Entered: December 31, 1992 65398

Calendar Date: September 15, 1992

Before: Levine, J.P., Mercure, Mahoney, Casey and Harvey, JJ.

Miller, Cassidy, Larroca & Lewin (Lisa Burget and George Shebitz of counsel), Washington D.C. for Board of Education of the Kiryas Joel Village School District, appellant.

Ingerman, Smith, Greenberg, Gross, Richmond, Heidelberger, Reich & Scricca (Lawrence W. Reich of counsel), Northport, for Board of Education of the Monroe-Woodbury Central School District, appellant.

Jay Worona, New York State School Boards Association, Albany, respondent.

Robert Abrams, Attorney-General (Julie S. Mereson of counsel), Albany, pursuant to Executive Law § 71.

Bernard F. Ashe (Gerard John De Wolf of counsel), Albany, for New York State United Teachers, *amicus curiae*.

Marc D. Stern, New York City, for American Jewish Congress, *amicus curiae*.

Stanley Geller (Lisa Thurau of counsel), New York City, for Committee for Public Education and Religious Liberty, *amicus curiae*.

CASEY, J.

Appeal from a judgment of the Supreme Court (Kahn, J.), entered February 10, 1992 in Albany County, which, *inter alia*, granted plaintiffs' motion for summary judgment and declared the Laws of 1989 (ch 748) unconstitutional.

The laws of 1989 (ch 748) (hereinafter chapter 748) created a new school district, the Kiryas Joel Village School District (hereinafter the Village District), consisting of the territory of the Village of Kiryas Joel (hereinafter the Village), a community of Satmarer Hasidim located wholly within the boundaries of the Monroe-Woodbury Central

School District (hereinafter the Monroe-Woodbury District) in Orange County. The statute reflects a political solution to a lengthy dispute between the Monroe-Woodbury District and the residents of the Village, most of whose children attend private religiously affiliated schools within the Village, concerning the provision of special educational services to the Village's handicapped children.

Despite earlier efforts at accommodating the undisputed needs of the Village's handicapped children, resolution of the dispute, which centered on where the services had to be offered, was sought by way of litigation. The Court of Appeals ultimately held that the Monroe-Woodbury District "is neither compelled to make services available to private school handicapped children only in regular public school classes and programs, nor without authority to provide otherwise" (*Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, 72 NY2d 174, 187). The court also rejected the Villagers' claim that the services had to be provided within their private schools or at a neutral site (*id.*, at 187-189). Unfortunately, the dispute was not resolved, for the Monroe-Woodbury District continued to offer the services at its public schools and the Villagers refused to permit their children to attend the public schools. The creation of the Village District, which could establish its own public school to provide the services within the Village, was viewed as "a good faith effort to solve this unique problem" (Governor's Mem, 1989 McKinney's Session Laws of NY, at 2430).

Plaintiffs, the New York State School Boards Association (hereinafter the Association) and two officers of the Association, commenced this action against several State officials, including the Commissioner of Education and the Comptroller, seeking a judgment declaring chapter 748 unconstitutional. The two school districts moved to intervene

as defendants and their motions were granted. Thereafter, the parties stipulated to the discontinuance of the action as to the State officials, although the Attorney-General continued to defend the constitutionality of the statute pursuant to Executive Law § 71. The parties cross-moved for summary judgment and Supreme Court declared the statute unconstitutional, resulting in this appeal.

The preliminary issue to be addressed is the question of standing. Defendants maintain that the Association and its officers, in their capacity as representatives of the Association, do not have standing to maintain this action. We agree. There is nothing in the record to establish that the Association itself is a citizen-taxpayer within the meaning of State Finance Law article 7-A and there is no claim that the Association has sustained any injury in fact. Accordingly, the Association does not have standing in its own right to maintain this action (*see, Matter of Otsego 2000 v Planning Bd. of Town of Otsego,* 171 AD2d 258, 260, *lv denied* 79 NY2d 753). Nor has it been shown that the Association meets the three requirements for associational or organizational standing (*Society of Plastics Indus. v County of Suffolk,* 77 NY2d 761, 775). As units of municipal government, the Association's member school boards do not have the substantive right to raise constitutional challenges to a State statute, particularly in the absence of any claim that compliance with the statute will force one or more of the member school boards to violate a constitutional proscription (*see, Matter of Jeter v Ellenville Cent. School Dist.,* 41 NY2d 283, 287). The only two school districts that might arguably have standing, the Monroe-Woodbury District and the Village District, are parties to this action and the Association clearly does not represent their interests. We conclude therefore, that the Association and the officers of the Association lack standing to maintain this action. We note that plaintiffs'

reliance on *New York State School Bds. Assn. v Sobol* (168 AD2d 188, *affd* 79 NY2d 333) is misplaced, for the issue of the Association's standing to maintain that action was neither raised nor decided.

The two individual plaintiffs, Louis Grumet and Albert W. Hawk, are named as party plaintiffs individually, as well as in their capacity as officers of the Association. In their individual capacity, each clearly meets the definition of citizen-taxpayer contained in State Finance Law § 123-a and, therefore, they have statutory standing to maintain an action for declaratory or injunctive relief to prevent the unconstitutional disbursement of State funds (State Finance Law § 123-b [1]). It is undisputed that the Village District created by chapter 748 wil receive State funding and, therefore, the constitutionality of that statute can be challenged in a citizen-taxpayer action (*see, Matter of Cario v Sobol,* 157 AD2d 172, 175). The fact that the action was discontinued as the State officials when the two school districts intervened as party defendants does not alter this conclusion, for the expenditure of State funds remains an issue and the Attorney-General continues to appear in the action pursuant to Executive Law § 71.

Turning to the merits, we agree with Supreme Court that chapter 748 violates the Establishment Clause of the US Constitution and NY Constitution, article XI, § 3. The tripartite analysis under the Establishment Clause introduced in *Lemon v Kurtzman* (403 US 602, 612), which the United States Supreme Court declined to reconsider in *Lee v Weisman* (___ US ___, ___, 112 SCt 2649, 2655), requires: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion * * * [and third], the statute must not foster 'an excessive governmental entanglement with religion' " (*Lemon v Kurtzman, supra,* at

612-613, quoting *Walz v Tax Commn.*, 397 US 664, 668 [citation omitted]).

According to defendants, the statute has the secular purpose of providing special educational services to handicapped children who are not receiving those services. This argument ignores two undisputed facts: the handicapped children of the Village were already entitled to receive those services pursuant to existing Federal and State law (*see*, 20 USC § 1400 *et seq.*; Education Law § 4401 *et seq.*), and those services were actually available to the Village children from the Monroe-Woodbury District, within which the Village was located. The only reason that the children did not receive the services is their parents' refusal to let them attend the public schools of the Monroe-Woodbury District where the services were available. The stated reason for this refusal is the fear and trauma allegedly sustained by the children upon leaving the language, lifestyle and environment of the Village and mixing with others (*Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, 72 NY2d 174, 188, *supra*). The challenged statute, therefore, was designed not merely to provide special educational services to the handicapped children of the Village, but to provide those services within the Village so that the children would remain subject to the language, lifestyle and environment created by the community of Satmarer Hasidim and avoid mixing with children whose language, lifestyle and environment are not the product of that religion. The dissent finds a secular purpose for the statute in that it would provide the handicapped children of the Village with the publicly supported, secular special educational services they need and to which they are entitled, but as previously noted those services were already available to all of the handicapped children of the Monroe-Woodbury District, including the handicapped children of the Village. Thus, the only secular

need for the statute recognized by the dissent did not, in fact, exist.

Assuming that the statute can be viewed as having a secular purpose, the second guideline of the *Lemon* test requires that the principal or primary effect must not advance religion. The Court of Appeals recently explained:

> A particular concern under the "effects" prong is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices" * * *. Context determines whether particular governmental action is likely to be perceived as an endorsement of religion * * *. Governmental action "endorses" religion if it favors, prefers, or promotes it * * *(*New York State School Bds. Assn. v Sobol*, 79 NY2d 333, 339-340, quoting *School Dist. of City of Grand Rapids v Ball*, 473 US 373, 390 [citations omitted]).

Defendants claim that the creation of a school district to provide educational services should be treated no differently than the creation of a village to provide municipal services, such as police and fire protection. The Supreme Court, however, has recognized that the relationship between government and religion in the education of children is a sensitive one and that government's activities in this area can have a magnified impact, creating "an all-too-ready opportunity for divisive rifts along religious lines in the body politic" (*School Dist. of City of Grand Rapids v Ball, supra*, at 383).

Defendants also contend that the provision of educational services to sectarian students and the segregation of those students from others who are not of that sect are incidental benefits which do not offend the Constitution (*see, Mueller v Allen*, 463 US 388, 389; *Woman v Walter*, 433 US 229, 247-248). Considering the entire context in which the statute was enacted, we conclude that the statute not only authorizes a religious community to dictate where secular public educational services shall be provided to children of the community, it creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test.

As previously noted, the educational services which the statute was intended to provide were already available to the Village children at public schools within the school district where they resided but outside the boundaries of the Village. If those services were inadequate or inappropriate, as defendants now suggest, existing remedies were available for the parents to pursue (*see*, Education Law § 4404). Instead, the parents claimed that the service had to be provided within the private schools in the Village or at a neutral site within the Village. When this claim proved unsuccessful (*see, Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder, supra*), the parents continued to refuse the services available at the public schools of the Monroe-Woodbury District.

Chapter 748 created a school district coterminous with the Village, which is inhabited by residents who are almost exclusively of one religious sect. The school board is controlled by members of that sect and the children who attend the public school established by the district are all of that sect. The services provided by the school were already available to the children of the Village, but their parents refused to permit them to mix with other students whose language, lifestyle and environment were not the product of

the same religious sect. As a result of the statute, the services which were otherwise available at the public schools of the Monroe-Woodbury District are now provided by a public school that is controlled by and located within the religious community, and the children of the community who attend that school are effectively segregated from children of other religions. Regardless of whether the public school operated by the Village District is a neutral site, and regardless of how scrupulous the district is in maintaining the secular nature of the educational services offered at the school, we are of the view that the symbolic union between church and state effected by the creation of a school district coterminous with a religious enclave to provide within that enclave educational services that were already available elsewhere is significantly likely to be perceived by adherents of the Satmarer Hasidim as an endorsement, and by nonadherents as a disapproval, of their individual religious beliefs (*see, School Dist. of City of Grand Rapids v Ball, supra*, at 389-392).

We emphasize that it is not the location of the public school in the religious community and the provision of public educational services to sectarian students that we find offensive to the Establishment Clause (*see, Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder, supra*, at 189 n 3). The impermissible effect is the symbolic impact of creating a new school district coterminous with a religious community to provide educational services that were already available in an effort to resolve a dispute between the religious community and the school district within which the community was formerly located, a dispute based upon the language, lifestyle and environment of the community's children created by the religious tenets, practices and beliefs of the community.

The dissent asserts that we are foreclosed from considering whether the religious tenets, practices and beliefs of the community played a role in the Village's refusal to accept the special educational services offered by the Monroe-Woodbury District. The record, however, contains uncontradicted evidence of a direct link between the language, lifestyle and environment of the community's children and the religious tenets, practices and beliefs of the community. Based upon similar evidence and in a similar procedural posture, the Court of Appeals had little difficulty finding such a connection. "With an apparent over-all goal that *children should continue to live by the religious standards of their parents*, 'Satmarer want their school to serve primarily as a bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and, in the case of girls, as a place to gather knowledge they will need as adult women' * * *" (*Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder, supra*, at 180 [emphasis supplied, citation omitted]). The stated reason for the Satmarer parents' refusal of the services offered by the Monroe-Woodbury District was the emotional toll of the Satmarer children allegedly sustained upon "leaving their own community and being with people whose ways were so different from theirs" (*id.*, at 181). Because the "ways" of the Satmarer children were molded by the religious standards of their parents (*id.*, at 180), there can be little doubt that, in fact, religion played a role in the dispute, which we have considered as one of several factors in our decision. Contrary to the dissent's interpretation, our holding, which concerns only the validity of the statute that created a new school district coterminus with a religious community to provide secular services that were already available to the community, has no bearing on whether the Satmarer are somehow "disqualified" from receiving those services. It is

noteworthy that although the dissent asserts that we must ignore these undisputed facts, the dissent's "fair and comprehensive analysis by an objective observer" encompasses a search both within and without the record to support the theory that the statute's creation of a school district coterminus with a religious community to provide services to that community which were already available is not relevant in determining whether the particular governmental action is likely to be perceived as an endorsement of religion.

Finding that the Satmarer's handicapped children have "special psychological vulnerabilities * * * to exposure to the outside world", the dissent is apparently of the view that the special educational services offered by the Monroe-Woodbury District were not "protective" of these "special psychological vulnerabilities". Pursuant to Federal and State Law, handicapped children are entitled to an appropriate special education program and placement, and a parent who finds the placement unacceptable can seek review (*Matter of Northeast Cent. School Dist. v Sobol*, 79 NY2d 598, 603). If, as the dissent assumes, the services offered by the Monroe-Woodbury District were inappropriate as not "protective" of the Satmarer children's "special psychological vulnerabilities", the parents had an available administrative remedy to review the proposed placements pursuant to Education Law § 4402 and, if necessary, judicial review of the determination produced by the administrative appeal. This review process could have addressed all of the parents' secular concerns. The dissent's suggestion that the creation of a new school district was the appropriate remedy to address the Satmarer parent's claim that the services offered by the Monroe-Woodbury District were inappropriate for the special needs of their children is less than compelling.

The dissent's alternative argument, that the creation of a new school district might constitute "a valid alleviation of a burden on the Satmarer's religious precepts", is premised on "the majority's assumption that segregated education of their young is an integral part of Satmar religious precepts". We have made no such "assumption". We have merely recognized that uncontradicted evidence in this record and in the prior litigation establishes a direct link between the Satmarer parents' refusal to accept the services of the Monroe-Woodbury District and the religious tenets, practices and beliefs of the community which have molded the language, lifestyle and environment of the community's children, resulting in an alleged emotional toll when the children leave the community and are with people whose ways are so different from theirs. The Satmarer themselves do not claim that they refused the services of the Monroe-Woodbury District because segregated education of their young is an integral part of Satmarer precepts and we have not made such an assumption. By going beyond the stated position of the Satmarer, the dissent has disregarded its own limitation on the scope of review of the facial validity of chapter 748.

Having concluded that even if chapter 748 has a secular purpose its principal or primary effect advances religion, we see no need to consider the third prong of the *Lemon* test. Although we have concluded that the Association and its officers lacked standing to maintain this action, we see no need to modify Supreme Court's declaratory judgment, which did not grant any specific relief to the Association or its officers. The individual plaintiffs have standing to maintain this action as citizen-taxpayers and Supreme Court granted the appropriate declaratory relief. Its judgment should, therefore, be affirmed.

Mercure, Mahoney and Harvey, JJ., concur.

LEVENE, J.P. (dissenting).

In my view, it was error for Supreme Court to have granted summary judgment declaring the legislation under review here (L 1989, ch 748) (hereinafter chapter 748) creating the Kiryas Joel Village School District (hereinafter the Village District), encompassing the territory of the Village of Kiryas Joel (hereinafter the Village) itself, to be facially invalid as a violation of the Establishment Clause of the 1st Amendment to the US Constitution or of article XI, § 3 of the NY Constitution.

I find the distinction, for Establishment Clause purposes, between a law's facial invalidity and invalidity as applied to be far from clear in the case law (*see, Bowen v Kendrick*, 487 US 589, 601-602; *id.*, at 627-628 [Blackman, J., dissenting]). What is clear, however, is that, in deciding that this case was ripe for a determination of the statute's facial invalidity on a motion for summary judgment, Supreme Court and the majority of this court have relied upon extrinsic evidence sharply disputed by the Village District and have ignored evidence submitted by the Village District showing its religiously neutral implementation of the statute, a factor I believe is relevant on the statute's validity both facially and as applied. Moreover, I think the statute is sustainable on a facial challenge even under the majority's factual assumptions, as a limited, permissible accommodation to the values represented by the Free Exercise Clause of the 1st Amendment on behalf of the Satmarer Hassidim inhabiting the Village. I would, therefore, reverse, declare the statute facially valid and remit for trial of the disputed factual issues to determine whether the statute is valid as applied. Clearly, plaintiffs have raised a challenge to the validity of the statute as applied in the second amended complaint and the submissions on their motion for summary

judgment. Thus, I would give the Satmarer Hassidim their day in court to establish that the statute can be and has been implemented in a way that sufficiently separates the Village District's provision of special educational services for their handicapped children from their religious precepts and practices to avoid conflict with the Establishment Clause.

The invalidity of a statute under the Establishment Clause, facially or as applied, is to be determined by whether it contravenes one or more of the three elements of the test announced in *Lemon v Kurtzman* (403 US 602, 612) and recently left standing by the United States Supreme Court in *Lee v Weisman* (____ US ____, ____, Establishment Clause a statute must have a secular legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive governmental entanglement with religion.

Regarding the "purpose" prong of the *Lemon* test, the legislative history of chapter 748 recites that it was enacted to break the impasse between the members of the Satmar Hassidic sect, who comprise the vast majority of the inhabitants of the Village, and the Monroe-Woodbury Central School District (hereinafter the Monroe-Woodbury District), whose territory contained the Village, over the public provision of special educational services for the handicapped children of the Village. As is more fully described in the Court of Appeals' decision in the previous litigation involving this dispute (*see, Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder,* 72 NY2d 174), the Monroe-Woodbury District had taken the position that special educational services would only be offered at fully integrated public schools located outside the Village, whereas the Satmarer parents insisted that their handicapped children should be provided these services in the Village, either at the parochial schools where all of the nonhandicapped Sat-

marer children are educated, or at a neutral site. When the prior litigation failed to resolve the dispute (*see, id.*), chapter 748 was enacted for the stated purpose of ensuring that the handicapped children of the Satmarer Hassidim would receive the publicly supported, *secular* special educational services they need and to which they are entitled, at a neutral site in the Village (*see,* Governor's Mem, 1989 Legis Ann, at 324-325).

The foregoing secular purpose is sufficient to comply with the purpose facet of the *Lemon* test, which is only breached if the enactment was "motivated *wholly* by [a religious] purpose" (*Bowen v Kendrick,* 487 US 589, 602, *supra* [emphasis supplied]; *see, Wallace v Jaffree,* 472 US 38, 56). Thus, the apprehension expressed in the majority's decision as to some additional, or perhaps ulterior, religion-based motive underlying the enactment of chapter 748 would not serve to render it invalid in this respect. Moreover, in determining the legislative purpose for Establishment Clause analysis, "a court has no license to psychoanalyze the legislators * * *. If a legislature expresses a plausible secular purpose * * * then courts should generally defer to that stated intent * * *" (*Wallace v Jaffree, supra,* at 74-75 [O'Connor, J., concurring] [citations omitted]).

The ultimate ground for the majority's invalidation of chapter 748, however, is its conclusion that the primary or principal effect of the legislation is to advance religion. I disagree. It bears emphasis that we are reviewing a determination that chapter 748 is facially invalid, made by Supreme Court in granting plaintiffs' motion for summary judgment. In deciding upon the facial validity of the statute, particularly on cross motions for summary judgment, I believe that this court should not be looking for ulterior motives for the enactment. Rather, we are bound to look at

chapter 748 as a response to the *stated* position of the Satmar sect, expressed not only in sworn affidavits here but consistently throughout the dispute over special educational services for its handicapped children (*see, Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder,* 72 NY2d 174, 180 n 2, 189, *supra*). As repeatedly stated, the motive for the Satmarer parents' refusal to accept the special educational services for their handicapped children offered by the Monroe-Woodbury District was not religious, but was to protect the children from the psychological and emotional trauma caused by exposure to integrated classes outside the Village that were inadequately addressed by the professional staff of the Monroe-Woodbury District.

Thus, on summary judgment the majority seems erroneously to be relying upon a description of Satmar religious precepts on educating the sect's nonhandicapped children contained in the affidavit of Israel Rubin, Ph.D., submitted by plaintiffs, as establishing a religion-based motivation for the refusal of the Satmarer Hassidim to accept the special educational services offered by the Monroe-Woodbury District. Such a sectarian basis for their refusal, however, appears to be directly contradicted by the affidavit of the School Board President of the Village District submitted in the instant case as to the reason why the Monroe-Woodbury District's offer of such services was refused. That affidavit states:

> Monroe-Woodbury has refused to accommodate the distinct language and cultural needs of the handicapped children in [the Village] by providing their education at a neutral site in their locality. * * * Because Monroe-Woodbury's restrictions on the educational services for the handicapped children from [the Village] would have a major adverse effect

> on their educational progress, the handicapped children in [the Village] were not able to receive the special educational services they needed from the public educational system.

The foregoing secular basis for the refusal to accept the services provided by the Monroe-Woodbury District was the same position asserted by the Satmarer Hassidim in the *Board of Educ. of Monroe Woodbury Cent. School Dist. v Wieder* (*supra*) litigation. Indeed, the reason why the Court of Appeals in that case refused to entertain a belated claim that providing such special educational services at a neutral site in the Village was mandated under the Free Exercise Clause was that the Satmarer "in their submissions to the trial court insisted that, as a class, they should be exempted from public school placements only for *nonreligious* reasons—most particularly because of the emotional impact on the children of traveling out of Kiryas Joel" (*id.*, at 189 [emphasis in original]). And, in the same decision, after quoting from a treatise describing Satmar religious precepts on the education of children authored by the person whose affidavit the majority relies upon here, the Court of Appeals added in a footnote that the members of the Satmar sect in that case never conceded the accuracy of that description. "Indeed, in their submissions, they make no reference to their religious beliefs or practices, only their life-style and environment" (*id.*, at 180 n 2).

While I am not able to discern with complete confidence why the majority rejects the foregoing religious-neutral explanation by the Satmarer for their refusal to accept the special educational services of the Monroe-Woodbury District, the majority's rationale seems to be based on either one of two propositions. The first of these is that the Satmarer's explanation is disingenuous, i.e., that segregated edu-

cation of even its handicapped children is in fact at the core of the Satmar sect's religious beliefs. That proposition, however, is clearly contested by the Village District and, thus, cannot properly form the basis for granting plaintiffs' motion for summary judgment. Beyond that procedural barrier to adopting this proposition, it has grave constitutional implications because it entangles a state civil court in factfinding on what is true Satmar religious doctrine on educating handicapped children (*see*, Tribe, American Constitutional Law § 1411, at 1231 [2d ed]).

Alternatively, the majority's decision may be read as concluding that the Satmarer's professed secular explanation for rejecting the Monroe-Woodbury District's offer of services is, nonetheless, religion based, because the Satmarer's cloistered lifestyle and cultural outlook are derived from their religious beliefs. This, too, has grave constitutional implications under both religion clauses of the 1st Amendment. In effect, the majority is saying that the State may not respond to a bona fide *secular interest* of the Satmarer Hassidim, i.e., the psychological and emotional vulnerabilities of their handicapped children, because the culture bringing about the insecurities of these youngsters was "molded" by Satmar religious precepts. In a real sense, then, the majority is thus holding that merely because of some link between their religion and a legitimate secular need, the Satmarer are disqualified from receiving from the State the purely secular services to meet that secular need. The case law simply does not support such a rigidly impenetrable wall between church and state as is implicit in this aspect of the majority's decision. Indeed, such a holding conflicts with the United States Supreme Court's decisions that a state does not violate the Establishment Clause by commemorating the secular, *cultural* aspects of the Christmas/Chanukah holiday season, despite its religious

origins (*see, Allegheny County v Greater Pittsburgh American Civ. Liberties Union*, 492 US 573, 617-620; *Lynch v Donnelly*, 465 US 668). Thus, in my view, the alleged motivations of the Satmarer Hassidim for refusing fully integrated special educational services outside the Village cannot be the basis for a determination of a facial invalidity of the statute on a summary judgment motion.

Furthermore, in resolving doubts regarding the facial validity of a statute, a court may properly look to how it has been interpreted and applied by the governmental agency charged with enforcing it (*see, Ehlert v United States*, 402 US 99, 105-107; *see also, Grayned v City of Rockford*, 408 US 104, 110-111). Therefore, for summary judgment purposes, the sworn submissions of the Village District on the manner in which chapter 748 has been implemented should also be accepted as true. Summarized, the Village District's proof is that the provision of special educational services under chapter 748 takes place at a site distinctly and physically separate from the Village parochial schools and, indeed, from any other place of religious observance. Additionally, the services being provided are distinctly secular as to content, professional staff and physical surroundings.

In the absence of a religious purpose for creation of the Village District as a substitute for the Monroe-Woodbury District, the provision of a purely secular special educational services to the Satmarer handicapped children in an atmosphere that is *not* only *not* "pervasively sectarian", but actually totally devoid of religious influences, appears to be virtually indistinguishable from the provision of therapeutic and remedial services to isolated groups of parochial school students upheld by seven justices of the United States Supreme Court in *Wolman v Walter* (433 US 229, 244-248). In *Wolman*, the Supreme Court specifically rejected the notion that the provision of secular therapeutic and remedial

services to school children at a neutral site is suspect, as having the effect of advancing religion, merely because the recipients of the services were separate groups composed exclusively of parochial school students (*id.*).

If not virtually the same as in *Wolman v Walter* (*supra*), the fact pattern which we are bound to accept in the present procedural posture of the case is far closer to *Wolman* than it is to *Parents' Assn. of P.S. 16 v Quinones* (803 F2d 1235), the case most heavily relied upon by Supreme Court in granting summary judgment in this case. In *Parents' Assn. of P.S. 16,* the challenged program of remedial instruction for the Satmarer parochial school children at the premises of a New York City public school not only ethnically segregated the children, it virtually replicated the educational practices of the Satmar parochial school by gender segregation for teachers and students, the use of Yiddish as the primary language of instruction and adoption of a reading instruction method employed only in the parochial school (*id.*, at 1237). Additionally, in *Parents' Assn. of P.S. 16,* the court accepted factual assertions regarding Satmar religious precepts on education and relied on factual concessions of public educational authorities that are in dispute here and, thus, should be disregarded on summary judgment in the litigation at hand.

Despite the similarity between the instant case and *Wolman v Walter* (*supra*), as premised on the only facts which this court should properly consider, the majority holds nonetheless that the statutory creation of the Village District has the primary effect of advancing religion because it will be *perceived* as a symbolic state endorsement of Satmar Hassidism. As I read the majority decision, this conclusion is based upon three factors: (1) the creation of a school district coterminous with a "religious enclave", (2) the preexisting availability of special educational services for

Satmarer handicapped children provided by the Monroe-Woodbury District outside the Village, and (3) that the true basis for the Satmarer's refusal to accept the integrated special educational services for their handicapped children outside the Village was the conflict which fully integrated schooling would present to their fundamental religious beliefs, or with cultural values inseparable from their religious beliefs.

As to the majority's supposition that the Satmarer's refusal to accept the special education services offered by the Monroe-Woodbury District was religion based, I shall not repeat the reasons for my strong conviction that, on a facial challenge, and particularly on a motion for summary judgment in that context, we are not permitted to go behind the publicly stated and sworn to position of the Satmarer Hassidim of a nonreligious motivation for the refusal.

At first blush, the two other factors relied upon by the majority might well be instinctively perceived as establishing that the State too readily acceded to the Satmarer's "dictates" and, in some sense, thereby symbolically endorsed the sect's religious tenets. However, the question of whether a statute's primary effect is to aid religion by reason of being perceived as a State endorsement of some religious denomination, or of religion in general, is not to be answered by an uncritical reaction to some superficial or selective presentation of the facts or circumstances concerning the legislation in question. Justice O'Connor, the original proponent of the perception of endorsement approach to adjudging the principal effects of religion-related legislation (*see, Lynch v Donnelly,* 465 US 668, 691-692, *supra* [O'Connor, J., concurring]), has stated that "[t]he relevant issue is whether *an objective observer,* acquainted with the text, *legislative history,* and *implementation* of the statute, would perceive [the statute] as a state endorsement" (*Wal-*

lace v Jaffree, 471 US 38, 76, *supra* [O'Connor, J. concurring] [emphasis supplied]).

A fair and comprehensive analysis by an objective observer would have to take into account (1) the professed lack of religious motive of the Satmarer Hassidim for the creation of the Village District previously described, (2) that, uncontrovertably, the Satmarer would have been content had the Monroe-Woodbury District provided educational services at a neutral site in the Village, thus obviating many of the features of the creation of the Village District relied upon by plaintiffs to show symbolic endorsement of religion, (3) that, although the elected Board of Education of the Village District is likely to be entirely composed of Satmarer Hassidim, the Board lacks autonomy in appointing a Superintendent of Schools (*see*, Education Law § 1711 [3]) and the Superintendent is the official controlling the administration of the program (*see*, Education Law § 1711 [5],[1] and (4) that the implementation of chapter 748 has resulted in the appointment of a highly qualified professional, *not* a member of the Satamer sect, as Superintendent of Schools, who is administering the program with autonomy to provide purely secular special educational services in an atmosphere completely divorced from and in significant respects inconsistent with the precepts of the Satmar sect.

I think that the foregoing facts and circumstances would attenuate, in the eyes of an objective observer, the significance of the creation of a school district coterminous with

[1]Moreover, the Board of Education's ability to interject religion into the services provided to the children appears to be weak and improbable in light of the dominant supervisory and programatic regulatory role of the State Department of Education over special educational services for handicapped children (*see*, Education law § 4403; 8 NYCRR part 200).

the Village territory and the availability of special educational services outside the Village as indicia of a State endorsement of Satmar religious precepts. Both factors were merely collateral to the Satmarer's stated objective of obtaining purely secular special educational services for the sect's handicapped children and *their* willingness to accept those services in a truly nonsectarian atmosphere, so long as it was protective of the special psychological vulnerabilities of those children to exposure to the outside world. These are, in my opinion, the only inferences that can fairly be drawn from the evidence contained in the Village District's submissions, and they are insufficient to demonstrate a symbolic link between Church and State, as a matter of law (*see, Bowen v Kendrick*, 487 US 589, 613, *supra*).

Even if I were to agree with the majority, however, that the Satmar sect's refusal to accept the Monroe-Woodbury District's integrated special educational services for its handicapped children was based upon fundamental religious beliefs or upon cultural values inseparable from its religious beliefs, I would nonetheless hold that the accommodation of the State to those values and beliefs by the enactment of chapter 748 did not have the primary effect of advancing religion. Rather, the statute survives a facial challenge because its principal effect would then be to lift a substantial burden on the sect's free exercise of religion. The legitimacy of the right of an insular religious sect, under the Free Exercise Clause of the 1st Amendment, to prevent exposure of their children to the worldly influences and inconsistent secular values of the public school system was recognized in *Wisconsin v Yoder* (406 US 205, 218-219). Moreover, a state may constitutionally relieve a substantial governmental burden on a sect's exercise of its religion even when the burden falls short of an actual violation of the Free Exercise Clause (*see, Texas Monthly v Bullock*, 489 US 1, 18-19 n 8; *Corpo-*

ration of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos, 483 US 327, 334).

Here, the Monroe-Woodbury District had previously provided special educational services for Satmarer handicapped children at an annex to the sect's private parochial school for girls in the Village (*see, Board of Educ. of Monroe-Woodbury Cent. School Dist. v Weider*, 72 NY2d 174, 180, *supra*). In 1985, however, the Monroe-Woodbury District resolved that such services would only be offered in integrated classes at public schools outside the Village (*id.*). Thus, under the majority's assumption that segregated education of their young is an integral part of Satmar religious precepts, the Satmarer Hassidim were placed in the dilemma of either having to forego the substantial benefits of publicly supported educational services for their handicapped children or availing themselves of those benefits at the price of foregoing their religious convictions regarding the manner of educating their children. Unquestionably, a governmental decision that forces a religious observer "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to [obtain the benefits] * * * puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her [religious practice]" (*Sherbert v Verner*, 374 US 398, 404; *see, Hobbie v Unemployment Appeals Commn.*, 480 US 136, 140-141).

I am conscious of the danger that an unduly broad application of an accommodation to free exercise values rationale to uphold any governmental benefit to religion could ultimately result in the Free Exercise Clause swallowing up the Establishment Clause (*see, Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos, supra*, at 347 [O'Connor, J., concurring]; Note, *The*

Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause, 99 Yale L J 1127, 1138-1139). It cannot be said at this procedural stage in the action, however, that chapter 748 crosses the line from a valid alleviation of a burden on the Satmarer's religious precepts in separately educating their handicapped children to an invalid advancement of religion by promoting the Satmar sect's ability to inculcate its religious values in educating those children. First, undoubtedly, the loss of remedial and rehabilitative educational services for Satmarer handicapped children is a discernible, substantial burden (*see, Lee v Weisman*, ___ US ___, ___, 112 SCt 2649, 2677-2678 [Souter, J., concurring], *supra*). Second, the accommodation to Satmar religious educational practices is minimal, as compared to the practices in their parochial schools in the Village and to the accommodations described in *Parents' Assn. of P.S. 16 v Quinones* (803 F2d 1235, *supra*). The court in *Parents' Assn. of P.S. 16* took pains to suggest that a constitutionally valid, minimal accommodation to Satmar religious beliefs could have been devised in providing remedial services to the sect's parochial school students by emphasizing that "in the circumstances of the present case, it is difficult to believe that the City cannot devise alternatives for making its remedial services available to the Beth Rachel students in a way that neither requires them to disregard their religious beliefs nor appears to endorse those beliefs" (*id.* at 1242). Third, the Satmarer Hassidim had attempted to obtain an acceptable accommodation to their religious beliefs in a less symbolically promotional manner by countersuing in *Board of Educ. of Monroe-Woodbury Cent. School Dist. v Weider* (*supra*) to compel the existing public school system to provide special educational services to their handicapped children at a neutral site in the Village. When that attempt was unsuccessful

(*see, id.*) the statutory creation of the Village District became the only viable remaining means to accommodate Satmar practices regarding the separate education of the sect's children, a factor weighing in favor of the validity of the legislation (*see,* Tribe, American Constitutional Law § 14-15, at 1285-1286 [2d ed]). Fourth, the statute gives the Satmarer Hassidim no greater advantage in exercising their religious educational practices than they enjoyed prior to the Monroe-Woodbury District's decision to withdraw its special educational services from a site in the Village, an additional factor favoring validity (*see, Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos, supra,* at 337).

Where, as here, the challenged statute promotes Free Exercise values by alleviating a substantial government-imposed burden on a religious observance, the symbolism of a governmental endorsement is entitled to relatively little weight in determining whether the statute's primary effect is to advance religion. As Justice O'Connor observed in *Wallace v Jaffree* (472 US 38, 83):

> It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute—that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the 'objective observer,' * * * is acquainted with the Free Exercise Clause and the values it promotes. Thus individual percep-

> tions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

It follows from the foregoing that the statute facially passes the effects prong of the *Lemon* test, whether or not one agrees with the majority view that the statute represents an accommodation to the Satmarer's religious beliefs and practices.

Turning then to the remaining prong of the *Lemon* Establishment Clause test, i.e., whether the creation of the Village District leads to an excessive government entanglement with religion, I find that for purposes of a facial challenge a violation of that standard has also not been demonstrated. In aid to education cases under the Establishment Clause, the risk of excessive entanglement has been found to arise in three forms of potential, mutual church-state intrusiveness: (1) the need for intense surveillance of a publicly supported secular educational program conducted under the auspices of religious authorities, to insure the absence of any religious indoctrination, (2) dual and overlapping administration of the religious and secular parts of the educational program, necessitating a close, continuing relationship between secular and religious educational and administrative staff, and (3) political divisiveness, for example, from budgetary competition between secular and religious programs (*see, Lemon v Kurtzman,* 403 US 602, 623, *supra; Aguilar v Felton,* 473 US 402, 413-414). As pointed out in *Bowen v Kendrick* (487 US 589, *supra*), however, typically a finding of excessive entanglement in educational aid cases has "rested * * * on the *undisputed fact* that the elementary and secondary schools receiving aid were 'pervasively sectarian' and had 'as a substantial purpose the inculcation of

religious values'" (*id.*, at 616, quoting *Aguilar v Felton, supra*, at 411, quoting *Committee for Public Educ. & Religious Liberty v Nyguist*, 413 US 756, 768 [emphasis supplied]). The existence of a pervasively sectarian institutional setting for the Village District's programs, having a substantial purpose of religious indoctrination, certainly is not an "undisputed fact" here. Any monitoring of the program that occurs here would be exclusively of secular, not sectarian, professional staff. Furthermore, without the presence of religious educators or administrators participating in any of the programs conducted on premises by the Village District, the possibility of entanglements from necessary secular/sectarian working relationships is speculative and remote. Such factors have been held sufficient to sustain the validity of aid to education legislation under the excessive entanglement prong of the *Lemon* test (*see, Bowen v Kendrick, supra*, at 616-617; *Wolman v Walter*, 433 US 229, 248, *supra; Roemer v Board of Pub. Works of Maryland*, 426 US 736, 762). The potential for political divisiveness as a result of the creation of the Village District also seems remote. The Satmarer handicapped children are entitled to publicly financed special educational services according to their needs irrespective of where they are provided or who provides them. The threat of political divisiveness is belied by the fact that the Monroe-Woodbury District, the political subdivision most directly affected financially by the carving out of the Village District, has consistently supported the position of the Village District in the instant action.

Based upon all the foregoing reasons, I have concluded that chapter 748 is not facially invalid under the Establishment Clause of the 1st Amendment. I would also hold it valid facially under article XI, § 3 of the NY Constitution, inasmuch as there is utterly nothing in the language of the statute or its legislative history establishing that the Village

District is controlled by the Satmar sect. Accordingly, I would reverse Supreme Court's judgment, grant defendants partial summary judgment declaring chapter 748 facially valid, and remit to Supreme Court for trial on the outstanding issues of fact necessary to resolve the validity of the statute as applied.

ORDERED that the judgment is affirmed, without costs.

ENTER:

/s/MICHAEL J. NOVACK
Clerk

APPENDIX D—Order and Judgment of New York State Supreme Court, Albany County.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

LOUIS GRUMET, individually and as Executive Director of the New York State School Boards Association, Inc.; ALBERT W. HAWK, individually and as President of the New York State School Boards Association, Inc.; and the NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC.,

Plaintiffs,

against

NEW YORK STATE EDUCATION DEPARTMENT; THOMAS SOBOL, as Commissioner of the New York State Education Department; NEW YORK STATE BOARD OF REGENTS; EDWARD V. REGAN, as New York State Comptroller; EMANUEL AXELROD, as District Superintendent of Orange-Ulster BOCES; BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT; BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Defendants.

Index No. 1054-90
RJI No. 01-90-021649

At a Term of the Supreme Court of the State of New York held in and for the County of Albany at the Albany County Courthouse, Albany, New York, on the 10th day of October, 1991

Present: Hon. Lawrence E. Kahn, Justice

Plaintiffs, Louis Grumet, individually and as Executive Director of the New York State School Boards Association, Inc.; Albert W. Hawk, individually and as President of the New York State School Boards Association, Inc.; and the New York State School Boards Association, Inc., having commenced an action alleging that Chapter 748 of the Laws of 1989, which created the Kiryas Joel Village School District, violates constitutional principles of separation of church and state, and equal protection guarantees;

AND plaintiffs having appeared by their attorney Jay Worona, General Counsel for the New York State School Boards Association, Pilar Sokol, Esq., and Cynthia Plumb Fletcher, Esq., of counsel;

AND original defendants New York State Education Department, Thomas Sobol, the New York State Board of Regents, Edward V. Regan and Emanuel Axelrod, discontinued from the action by stipulation and previous order from this Court dated August 21, 1990, having appeared by their attorneys Robert Abrams, Attorney General of the State of New York, Mary Ellen Clerkin, Assistant Attorney

General, of counsel, in accordance with the terms of said stipulation and order;

AND defendant Board of Education of the Kiryas Joel Village School District having appeared by its attorneys Miller, Cassidy, Larroca & Lewin, Nathan Lewin, Esq., of counsel;

AND defendant Board of Education of the Monroe-Woodbury Central School District having appeared by its attorneys Ingerman, Smith Greenburg, Gross Richmond, Heidelberger, Reich & Scricca, Lawrence W. Reich, of counsel;

AND *amicus curiae* New York State United Teachers having appeared by its attorney Bernard F. Ashe, Attorney for New York State United Teachers, Gerard John DeWolf, Esq., of counsel;

AND plaintiffs having moved for an order granting summary judgment pursuant to Section 3212 of the New York State Civil Practice Law and Rules;

AND defendants Board of Education of the Kiryas Joel Village School District, Board of Education of the Monroe-Woodbury Central School District, and the New York State Attorney General, having all cross-moved for an order granting summary judgment upon the ground that the contested legislation does not violate constitutional principles of separation of church and state and equal protection guarantees;

NOW, upon reading and filing the second amended complaint with exhibits annexed; defendants' answer with exhibits annexed; plaintiffs' notice of motion and supporting memorandum of law, together with the affidavits of Jay Worona, Dr. Israel Rubin, the Honorable Thomas Sobol, Dr. Hannah Flegenheimer, Gerard John DeWolf, Michael H. Sussman, Louis Grumet and Albert W. Hawk attached thereto; the brief *amicus curiae* in support of plaintiffs'

motion; plaintiffs' reply memorandum of law, together with the reply affidavit of Jay Worona, all submitted in support of plaintiffs' motion for summary judgment; the cross-motion and memorandum of law by the New York State Attorney General together with the affidavit of Mary Ellen Clerkin attached thereto, all submitted in support of the cross-motion filed by the New York State Attorney General; the cross-motion and memorandum of law of defendant Board of Education of the Kiryas Joel Village School District, together with the affidavits of David G. Webbert, Dr. Steven M. Benardo and Dr. Sara Fischer attached thereto; the reply memorandum of law of defendant Board of Education of the Kiryas Joel Village School District, all submitted in support of defendant Board of Education of the Kiryas Joel Village School District's cross-motion for summary judgment; the cross-motion and memorandum of law of defendant Board of Education of the Monroe-Woodbury Central School District with the affidavits of Terrence Olivo, Philip R. Paterno and Lawrence W. Reich attached thereto; the reply memorandum of law of defendant Board of Education of the Monroe-Woodbury Central School District, together with the reply affidavit of Lawrence W. Reich, all submitted in support of defendant Board of Education of the Monroe-Woodbury Central School District's cross-motion for summary judgment; and, after hearing Jay Worona and Pilar Sokol, attorneys for plaintiffs, and Gerard John DeWolf, of counsel for *amicus curiae*, in support of plaintiffs' motion for summary judgment and in opposition to all of the cross-motions for summary judgment and Mary Ellen Clerkin, of counsel to the Attorney General of the State of New York, Nathan Lewin, attorney for defendant Board of Education of the Kiryas Joel Village School District and Lawrence W. Reich, attorney for defendant Board of Education of the Monroe-Woodbury Central School Dis-

trict, in opposition to plaintiffs' motion for summary judgment and in support of defendants' cross-motions; and due deliberation having been had thereon; and upon the decision of this Court dated January 22, 1992, a true and correct copy of which is annexed hereto and made part hereof;

NOW, on motion of Jay Worona, attorney for plaintiffs, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiffs' motion seeking an order declaring that Chapter 748 of the Laws of 1989 is unconstitutional be and the same hereby is granted; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants' and the New York State Attorney General's cross-motions seeking an order declaring that Chapter 748 of the Laws of 1989 is constitutional be and the same hereby are denied; and it is further

ORDERED, ADJUDGED AND DECREED that Chapter 748 of the Laws of 1989 be and the same hereby, is declared unconstitutional in violation of the Establishment/Clause of the First Amendment to the United States Constitution and its New York State counterpart, Article XI, section (3) of the New York State Constitution.

LAWRENCE E. KAHN
Justice of the Supreme Court

Dated: February 3, 1992
Albany, New York

APPENDIX E—Opinion of the New York State Supreme Court, Albany County.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

LOUIS GRUMET, Individually and as Executive Director of the New York State School Boards Association, Inc.; ALBERT W. HAWK, Individually and as President of the New York State School Boards Association, Inc., and the NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC.,

Plaintiffs,

against

NEW YORK STATE EDUCATION DEPARTMENT; THOMAS SOBOL, as Commissioner of the New York State Education Department; NEW YORK STATE BOARD OF REGENTS; EDWARD V. REGAN, as New York State Comptroller; EMANUEL AXELROD, as District Superintendent of Orange-Ulster BOCES; BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT; BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Defendants.

Supreme Court—Request for Judicial Intervention

March 7, 1990-August 14, 1991—RJI 0190 021649 Index No. 1054-90

JUSTICE LAWRENCE E. KAHN, Presiding

Appearances:

New York State School Boards Association Legal Department, Attorneys for plaintiffs, Jay Worona, Esq. (General Counsel) Cynthia Plumb Fletcher, Esq. (of Counsel) Pilar Sokol, Esq., 119 Washington Avenue, Albany, New York 12210, 465-3474

Miller, Cassidy, Larroca & Lewin, Esqs., Attorneys for KIRYAS JOEL VILLAGE SCHOOL DIST., David G. Webbert, Esq. (of Counsel), 2555 M Street, N.W., Washington, D.C. 20037, (202) 293-6400

Parisi, DeLorenzo, Gordon, Pasquariello & Weiskopf, P.C., Eric A. Tepper, Esq. (of Counsel) (Local Counsel), Attorneys for KIRYAS JOEL VILLAGE SCHOOL DIST., 210 Nott Terrace, Schenectady, New York 12307, 374-8494

Hon. Robert Abrams, Attorney General, Attorney for NEW YORK STATE, Mary Ellen Clerkin, Esq. (of Counsel), The Capitol, Albany, New York 12224, 473-6288

Ingerman, Smith, Greenberg, Gross, Richmond, Heidelberger & Reich, Esqs., Attorneys for MONROE-WOODBURY, Lawrence W. Reich, Esq. (of Counsel), 167 Main Street, Northport, New York 11768, (516) 261-8834

New York State United Teachers, *Amicus Curiae*, Gerard John DeWolf, Senior Counsel, 159 Wolf Road, Box 15-008, Albany, New York 12212-5008, 459-5400

KAHN, J.

This litigation challenges the constitutionality of Chapter 748 of the Laws of 1989, which created the Kiryas Joel Village School District. While presenting issues which are new and distinct, it continues years of litigation, which in one form or another, all emanate from attempts to obtain public funding for special education programs for children of the Satmar Hasidic Sect. Much of the history of the relationship between the present litigants has been documented by the Court of Appeals in *Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder,* (72 NY2d 174). Therein, the issue to be determined was whether special services to the handicapped children of the Village of Kiryas Joel were statutorily required to be provided in the public schools or in religiously affiliated private schools. Ultimately, the court determined that the applicable provisions of the Education Law did not require the Board of Education of the Monroe-Woodbury Central School District to offer such services only in regular public school classes. The court also rejected the contention that such services must be provided to non-public school children on the premises of the schools they normally attend. In its previous decision, the Court of Appeals set forth relevant background information, stating that:

> "Kiryas Joel is a community of Hasidic Jews. Apart from separation from the outside community, separation of the sexes is observed within the Village. Yiddish is the principle language of Kiryas Joel;

> television, radio and English language publications are not in general use. The dress and appearance of the Hasidim are distinctive—the boys, for example, wear long side curls, head coverings and special garments, and both males and females follow a prescribed dress code. Education is also different: Satmar children generally do not attend public schools, but attend their own religiously affiliated schools within Kiryas Joel." (p. 179 and 180).

In an acknowledged attempt to compromise the ongoing dispute, the challenged statute created a school district whose boundaries are literally contiguous with the incorporated Village of Kiryas Joel, and provided for the election of trustees with the powers and duties of trustees of a union free school district. A Board of Education was thereafter elected and the school properties within the boundaries of the new district were transferred off the rolls of the Monroe-Woodbury School district, effective July 1, 1990. The only "public" school within the new District provides educational services for handicapped children.

The instant declatory judgment action was commenced on or about January 19, 1990 and challenges the creation of the school district on constitutional grounds, asserting that it violates the principles of separation of church and state. Plaintiffs also assert that the legislation violates equal protection guarantees. Originally, the New York State department of Education and other state officials, including the Comptroller, were named as defendants. Motions to intervene were made by the Board of Education of the Monroe-Westbury School District and the Board of Education of Kiryas Joel Village School District. Those motions were granted by the court and a second amended complaint was served. By so-ordered stipulation, the action was discon-

tinued against the State defendants with the recognition that the Attorney General would continue to appear in support of the constitutionality of the statute (Executive Law, section 1). Presently, plaintiffs have moved for summary judgment seeking a declaration that Chapter 748 is unconstitutional.

The Attorney General and the party-defendants have all cross-moved for summary judgment seeking a declaration of constitutionality.

The legislation which has generated the present controversy is straightforward. It provides that:

> "The territory of the Village of Kiryas Joel in the Town of Monroe, Orange County, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel Village School District and shall have and enjoy all of the powers and duties of a union free school district under the provisions of the Education Law."

Section (2) of the legislation provides for the newly created District to be under the control of a Board of Education composed of between five and nine members elected by the qualified voters of the Village of Kiryas Joel. Finally, the bill provides that the terms of members of the school board shall not exceed five years. Plaintiffs assert that this act violates the Establishment Clause of the First Amendment to the United States Constitution and its New York State counterpart (Article XI, section 3).

Plaintiffs, individually, have standing to maintain this litigation. It is without doubt that encouraging individual citizen taxpayers "to take an active, aggressive interest in his state . . . [is] the classical means for effective scrutiny of legislative and executive action." (*Boryszewski v Brydges*, 37 NY2d 361, 364). "[A] citizen or taxpayer has

the right to challenge in the courts, as unconstitutional, acts of government (*Wein v Carey,* 41 NY2d 498, 500-501). Further, with respect to the New York State School Boards Association, said Association has very recently litigated similar questions, as a party plaintiff, without any question by either the other litigants or the judiciary concerning its standing to maintain the action. (*New York State School Boards Ass'n v Sobol,* N.Y.A.D. 3 Dept. 570 N.Y.S. 29, 716). Accordingly, the Appellate Division was satisfied that said Association had standing to litigate the issues before it. In this regard, the Appellate Division has determined that the issue of standing must be decided as a threshold issue before deciding constitutional challenges. (See: *County of Rensselaer v Regan,* A.D. 3 Dept., December 31, 1991).

Turning to the merits, the Court of Appeals has recognized that "[w]hile the principle of separation of Church and State is deep-rooted, . . . [t]here is no litmus test for determining which services may be rendered by a public body to parochial school students and which may not . . . ." (*Board of Educ. v Wider, supra,* p 189, footnote 3). In illustrating that principle, the court cited *Wolman v Walter,* (433 US 229), indicating that the decision had "so many categories and splintered votes that it can only read with a scorecard." (*Ibid*).

The leading and most-oft cited case upon the issues of separation of Church and State is *Lemon v Kurtzman,* (403 US 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745). Therein, the Supreme Court wrote that "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." (p 164). The Court determined that legislation, such as that challenged herein does not violate the Establishment

Clause if it has a secular purpose, has the principle or primary effect of neither advancing nor inhibiting religion, and does not foster an excessive entanglement with religion. Legislation which gives the appearance of providing a significant symbolic benefit to religion "by reason of the power conferred" (*Larkin v Grendal's Den*, S.Ct. 505, 511, 74 L.Ed. 2d 297), will not pass constitutional muster.

In applying the three-pronged test of *Lemon*, (*supra*), it becomes evident that the challenged statute violates all three. First, it has a sectarian rather than a secular purpose. There is no doubt that the legislation was an attempt by the Executive and Legislature to accommodate the sectarian wishes of the citizens of Kiryas Joel by taking the extraordinary measure of creating a governmental unit to meet their parochial needs.

The statute rather than serving a legitimate governmental end, was enacted to meet exclusive religious needs and has the effect of advancing, protecting and fostering the religious beliefs of the inhabitants of the school district.

The residents of the Village of Kiryas Joel have unequivocably refused and rejected any attempts to provide for the education of handicapped pupils from the Village at a neutral site previously offered by the Monroe-Woodbury School District. The present site can hardly be described as neutral. Rather, it lies squarely within the borders of a religious community, whose articulated goal is to remain segregated from the rest of society. Labeling the Village as a "union free public school district" cannot alter reality.

The Village of Kiryas Joel and the coterminous school district is an enclave of segregated individuals who share common religious beliefs which shape the social, political and familial mores of their lives from cradle to grave. "We want to be separate. It's intentional." (*Parents Association of P.S. 16, et al v Quinones*, 803 F.2d 1235, 1238). In fact,

this school district was created solely and exclusively to meet religious needs. Such a law clearly violates the establishment of religion clause of both the State and Federal Constitution. The establishment of a governmental unit, in this case, a school district, constitutes a most direct affront to the establishment clause. The legislation is an attempt to camouflage, with secular garments, a religious community as a public school district.

Said legislation also fosters excessive entanglements with religion. As the Commissioner of Education, Thomas Sobol, states in his affidavit, the Kiryas Joel Village School District is a dependent school district within the Orange-Ulster supervisory district and is a component district of the Orange-Ulster Board of Cooperative Educational Services. His affidavit also makes it clear that Boards of Education of dependent school districts may not appoint their own superintendents without express recommendation of the Executive Officer of the Supervisory District. Further, the Commissioner's affidavit outlines the extent to which the State Education Department must take special steps to monitor the newly created school district to ensure that public funds are not expended to further religious purposes. He concludes that his staff "in its monitoring capacity is unavoidably entangled in matters of religion." (Sobol affidavit, par. 12).

The intent of the Legislature and Executive to be responsive to the citizens of Kiryas Joel is laudatory and reflects the political process straining to meet the parochial needs of a religious group. However, their action violates the First Amendment which prohibits legislation which promotes the establishment of religion. The Satmar Hasidic sect enjoys religious freedom as guaranteed by the very First Amendment that they are now seeking to circumvent. This short

range accomplishment could in the long run, jeopardize the very religious freedom that they now enjoy.

The strength of our democracy is that a multitude of religious, ethnic and racial groups can live side by side with respect for each other. The uniqueness of religious values, as observed by the Satmar Sect, is especially to be admired as non-conformity becomes increasingly more difficult to sustain, however, laws cannot be enacted to advance and endorse such parochial needs in violation of our deep-rooted principle of separation of Church and State.

For the reasons hereinabove set forth, plaintiffs' motion for summary judgment shall be granted. The cross-motion by the Attorney General and the party-defendants for summary judgment, seeking a declaration of constitutionality shall be denied. Plaintiff shall be directed to submit an order and judgment which declares that Chapter 748 of the Laws of 1989 violates the Establishment Clause of the First Amendment to the United States Constitution and its New York State counterpart, Article XI, section (3). All papers are being returned to counsel for plaintiff, who shall submit an order in conformance herewith, with a copy of this decision annexed.

DATED: January 22, 1992
Albany, New York

APPENDIX F—Constitutional Provisions and Statutes Involved.

United States Constitution

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Laws of 1989 chapter 748

AN ACT to establish a separate school district in and for the village of Kiryas Joel, Orange County

The People of the State of New York represented in Senate and Assembly, do enact as follows:

§ 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.

§ 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

§ 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law.

APPENDIX G—Affidavit of Terrence Olivo.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

LOUIS GRUMET, individually and as Executive Director of the New York State School Boards Association, Inc.,; ALBERT W. HAWK, individually and as President of the New York State School Boards Association, Inc.,; and the NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC.,

Plaintiffs,

- against -

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT; and BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Defendants.

Index No. 1054-90
RJI No.
01-90-021649

Assigned Justice:
Hon. Lawrence E. Kahn

STATE OF NEW YORK)
) s.s.:
COUNTY OF ORANGE)

TERRENCE L. OLIVO, being duly sworn, deposes and says:

1. I am Superintendent of Schools of defendant Monroe-Woodbury Central School District, and I am personally familiar with the facts and circumstances underlying the within action from my conferences with school officials, with representatives of co-defendant Kiryas Joel Village School District and from my review of the books, documents and records of the municipal defendants.

2. I submit the within affidavit in opposition to plaintiffs' motion for summary judgment declaring Chapter 748 of the laws of 1989 to be unconstitutional on its face and in support of the cross-motion of defendant Board of Education of the Monroe-Woodbury Central School District (hereinafter "Board") to declare the facial constitutionality of such statute and to dismiss the Complaint of plaintiffs New York State School Boards Association, Louis Grumet and Albert W. Hawk in their respective representative capacities for lack of standing to sue.

Historical Antecedents of the Statute

3. In November, 1985, defendant Board of Education of the Monroe-Woodbury Central School District commenced an action seeking a declaration that it lacked statutory authority to furnish special education and "related" services to the handicapped students residing within the Incorporated Village of Kiryas Joel except in accordance

with the provisions of Education Law §3602-c, commonly referred to as the "dual enrollment" statute, which statute authorizes a board of education to provide such services to children attending nonpublic schools only in the regular classes of the public schools and not ". . . separately from pupils regularly attending the public schools." (Education Law, §3602-c subd.9)

4. Although Supreme Court, Orange County directed the Board of Education to provide the services to the handicapped students at a site not physically or educationally identified with but reasonably accessible to the children, the Appellate Division, Second Department reversed the decision of the Court below, construing the statute to require that plaintiff Board "to the maximum extent appropriate for the individualized needs of each child, . . . furnish special education and related services in the regular classes and programs of the public schools and not separately from public school students (13? A.D.2d 409, 417-418)."

5. On appeal, the Court of Appeals modified the order of the Appellate Division ". . . by declaring that plaintiff is not compelled by Education Law §3602-c or (*sic*) offer all services available to defendant-children only in the regular classes and programs of its public schools, and it is not without authority to provide otherwise; nor is plaintiff on this record compelled by law to offer defendants such services in the classes and programs of their nonpublic schools or at a neutral site" (72 N.Y.2d 174, 189, 190; 531 N.Y.S.2d 889, 897).

6. After the resolution of the litigation, defendant Board continued to offer programs and services to the Hasidic students within its public schools, but such programs and

services were declined by the Hasidic parents, whose children remained unserved through parental volition.

7. In response to the secular, educational consequences of the parents' refusal to accept programs and services in the regular classes of the public schools, the Legislature with the approval of the Governor enacted Chapter 748 of the Laws of 1989, which Chapter became effective July 1, 1990; a copy of the complete legislative bill jacket is annexed hereto and incorporated herein as Exhibit "A".

Plaintiffs' Motion Papers

8. In their motion papers in support of their application for summary judgment, plaintiffs seek judgment declaring the statute (Chapter 748 of the Laws of 1989) to be "facially invalid" as "violative of constitutional prescriptions for the separation of church and state, and equal protection guarantees under the Federal and State Constitutions, and as being statutorily defective as drafted" (See affidavit of Jay Worona, sworn to May 18, 1991; paragraph "2".)

9. The affidavit of plaintiffs' counsel in support of the motion for summary judgment is of no probative value, since it is not based on direct, personal knowledge.

10. It should be noted that the Second Amended Complaint alleges merely facial invalidity of the statute and does not allege that the statute is unconstitutional "as applied" in any particular instance or manner.

11. For this reason, the Court in a preliminary conference with the parties previously declined to permit plaintiffs to

conduct discovery and disclosure of the then intervenor-defendants until such time as the Complaint was further amended to allege "as applied" violations.

12. Upon information and belief, plaintiffs cannot effectuate a *de facto* amendment of their Complaint by alleging "as applied" violations in their motion set and thus broaden the scope of the action and nature of relief sought through motion practice rather than through amended pleadings.

13. While the Worona affidavit alleges that the statute is invalid in that it violates equal protection guarantees, the moving papers fail to articulate the factual basis for this allegation and the respective affidavits submitted in support of the motion are silent on the subject.

14. Similarly, the Worona affidavit alleges that the statute is invalid as statutorily defective as drafted, but the supporting affidavits again fail to address the issue, leaving defendants to speculate as to the basis for the objection.

15. Thus, the motion is inappropriate to the extent that it is based primarily upon an attorney's supporting affidavit which seeks to expand the nature and scope of relief sought by the Complaint by alleging "as applied" violations and by supporting affidavits which fail to address or amplify upon the bald assertion that the statute constitutes a denial of equal protection of law and is defective as drafted.

The Statute is not Statutorily Defective

16. In his affidavit of May 2, 1991, counsel for plaintiffs makes the bare allegation that the statute is statutorily de-

fective as drafted, although the motion papers fail to amplify the allegation.

17. The statute actually took effect July 1, 1990; plaintiffs took no action to enjoin or restrain implementation of the statute prior to its taking effect.

18. The qualified voters of the newly-created school district have duly elected the members of the Board of Education; no challenge was made in any Court or before the Commissioner of Education to the election of Board members or to the organization of the school district.

19. The Kiryas Joel Village School District having thus come into existence thereafter entered into contracts for goods and services, assessed its inhabitants for school taxes, contracted with certified teachers and actually provided educational services to certain special education students.

20. Upon information and belief, the enabling statute creating the Kiryas Joel Village School District contained all of the essential elements necessary to give effect to the legislative intent.

21. The Chapter defined the type of district; prescribed permissible number of board members; indicated that such trustees would have the powers and duties of the trustees of union free school districts; and clearly stated the law's effective date.

22. Other provisions of the Education Law, including but not limited to, those provisions of Article 31 of the Education Law which authorize the District Superintendent to

issue orders and conduct meetings or elections referable to the formation of a new district; Article 41 relating to district meetings and elections; and Article 43 relating to terms of office, should be construed *in pari materia* with the provisions of the Chapter.

23. Upon information and belief, the statute was specific enough to be susceptible of implementation and has in fact been implemented.

Constitutionality of the Statute

24. Upon information and belief, state statutes are presumed to be valid and constitutional, and the party challenging a statute bears a heavy burden of showing the contrary.

25. Upon information and belief, every presumption should be indulged in to support and sustain the statute, and it must be assumed that the Legislature intended to enact a statute which is in harmony with the Federal and State Constitutions.

26. Upon information and belief, a statute should be construed to uphold its constitutionality, and a Court should not strike down the statute as unconstitutional unless such statute clearly violates the Constitution.

27. Upon information and belief, if there is any doubt with respect to the constitutionality of the statute, the Legislature's expressed will should be upheld.

28. Upon information and belief, mere doubt does not

afford a sufficient basis for a judicial declaration of invalidity, for if there is a reasonable doubt as to its validity, an act must be upheld.

29. Upon information and belief, only when unconstitutionality is shown beyond a reasonable doubt can a court of first impression declare an act of the Legislature to be unconstitutional.

30. It is axiomatic that for a statute to pass muster under the Establishment Clause of the First Amendment of the United States Constitution, it must have a secular legislative purpose; it must have a primary effect that neither advances nor inhibits religion; and it must avoid an excessive entanglement with religion (*See Lemon v. Kurtzman*, 403 U.S. 602).

31. Upon information and belief, Chapter 748 of the Laws of 1989 is constitutional on its face in that it satisfies each element of the "tri-partite" or "three-pronged" test.

The Statute has a Secular Legislative Purpose

32. Upon information and belief, the Supreme Court of the United States in its recent Establishment Clause decisions has held that a court should give substantial deference to the legislative statements of purpose in an act and should be reluctant to attribute an impermissible purpose or motive to a legislative action.

33. This is especially true where there is a plausible secular purpose which may be discerned from the face of the statute.

34. Upon information and belief, where legislation is motivated in part by improper considerations and in part by legitimate concerns, it may not be set aside for lack of a secular legislative purpose, unless it is motivated wholly by an impermissible purpose.

35. Upon information and belief, the "secular legislative purpose" component of the *Lemon* test focuses upon whether a government's actual purpose is to send a message of endorsement or disapproval of religion or of a particular religious belief.

36. Chapter 748 of the Laws of 1989 clearly has a secular legislative purpose.

37. The bill jacket and the Governor's approval memo issued in connection with the Chapter clearly articulate a secular legislative purpose for the creation of the Kiryas Joel Village School District.

38. The principal Assembly sponsor of the Chapter indicated that its purpose was to furnish special education programs and services to the handicapped students in the Village of Kiryas Joel.

39. The Governor in his approval memorandum also noted that the purpose of the Chapter was to provide a mechanism for delivery of educational services to the handicapped children of Kiryas Joel in other than the public schools of the Monroe-Woodbury Central School District.

40. The Act created a public school district to be governed by a secular, popularly-elected Board of Education,

which Board is required to comply with all rules and regulations affecting public education with the State of New York.

41. Upon information and belief, the creation of such a public school district can hardly be perceived as transmitting a message of favoritism or endorsement of religion in general or of any particular religion in particular.

42. The Kiryas Joel Village School District, like all other public school districts, must employ only properly-certified educational personnel and must provide educational programs and services in accordance with State requirements.

43. Similarly, its non-certificated staff must meet applicable Civil Service rules and regulations.

44. As with all other public school districts, the property of the Kiryas Joel Village School District is secular in appearance and does not display any religious indicia on its buildings, walls or in its classrooms.

45. If any message is being sent, it is one of neutrality, since the Hasidic children within the Village of Kiryas Joel will be compelled to travel to a public school location and to receive secular instruction from secularly-trained and certified teachers within a facility totally divorced from the religious identity of the community.

46. Such action, the secularization of special education instruction, clearly does not act as an endorsement of religion or the principles of any particular religious body.

The Primary Effect of the Statute Neither Advances Nor Inhibits Religion

47. The United States Supreme Court has held that government promotes religion when it fosters a close identification of its powers and responsibilities with those of any, or all, religious denominations, and by such identification conveys a message of endorsement of religion.

48. The "primary effects" test is violated when government promotes or fosters a symbolic union of church and state which is sufficiently likely to be perceived by adherents of the controlling denomination as an endorsement and by nonadherents as a disapproval of religious choices.

49. It is well-settled that not every law which confers an indirect, remote or incidental benefit upon religious institutions is for that reason constitutionally invalid.

50. In such "indirect aid" cases, the government has used primarily secular means to accomplish a primarily secular end, and no primary effect of advancing religion has been found.

51. Upon information and belief, the creation of a secular public school district to service secular educational needs of the Hasidic handicapped students residing within the Village of Kiryas Joel will not be perceived by an objective observer as an endorsement of the *religious* beliefs of the Satmar community.

52. The neutrality between religion and non-religion in the operation of the district is manifest from such factors as the secular physical setting of the school, divorced from the

religious influences of the surrounding community; the employment of non-Satmar certified teachers and administrators; the use of English as the primary language of instruction; the mixing of boys and girls for instructional purposes, a practice strictly prohibited in the religious schools within the community; the subordination of male students to female teachers, again a practice prohibited within the religious schools of the community; the absence of religious indicia from building and classrooms; the physical separation of the school facility from the parochial schools and religious institutions of the community; and the use of secular curriculum materials for instructional purposes.

53. Upon information and belief, the objective observer would not perceive the public school as an extension of or as being identifiable with the religious schools within the community.

The Statute Does Not Foster an Excessive Entanglement Between Church and State

54. A statute is violative of the excessive entanglement prong of the *Lemon* test where it requires an extensive monitoring by public authorities to prohibit religious content in a publicly-funded program.

55. Such excessive entanglement arises where agents of the State must constantly visit and inspect the nonpublic facility to be alert for the overt or subtle pressures of religious matters in publicly-assisted classrooms.

56. The Supreme Court, however, has held that where aid is channeled to religiously-affiliated institutions which are not "pervasively sectarian", a court may not presume that a

substantial risk exists that such aid would knowingly result in religious indoctrination.

57. Thus, courts have declined to invalidate nonpublic aid programs which involve some degree of monitoring to religiously-oriented institutions which are not "pervasively sectarian", since there is no reason to fear that the less intensive monitoring would cause public authorities to intrude unduly in the day-to-day operation of such religiously-affiliated institutions.

58. Upon information and belief, the Kiryas Joel Village School District is not a pervasively-sectarian institution; to the contrary, it is a non-sectarian public school district.

59. It is not religiously-affiliated, nor is it physically or educationally identifiable with the functions of the non-public schools within the Village as to constitute an annex thereto.

60. Its public employees are not likely to tailor their behavior or services to religious influences, where such employees function in a facility free from the pervasively-sectarian atmosphere of the religious schools within the surrounding community.

61. As with any other religiously-pluralistic faculty or staff, the employees of the Kiryas Joel Village School District furnish secular services in furtherance of the secular mission of the school.

62. Furthermore, the Supreme Court has held that there cannot be an impermissible excessive entanglement arising from the supervision of public employees who provide

services at a neutral site off the premises of a non-public school to ensure that such employees maintain a neutral stance.

63. Under such circumstances, it can hardly be said that the supervision of public employees performing public functions on public school district property creates an excessive entanglement between church and state.

The Religious Composition of the Student Body at the Kiryas Joel School

64. Upon information and belief, a very significant percentage of the students at the Kiryas Joel Village School District are not Satmar Hasidim.

65. Upon information and belief, the mere fact that all of the students attending the Kiryas Joel Village School District may be of the same religious faith is not a basis for invalidating the enacting statute.

66. The Supreme Court in *Wolman v. Walter,* 433 U.S.229, sustained the constitutionality of so-called "neutral site", noting the fact that a unit on a neutral site might on occasion serve only sectarian pupils did not provoke the same concerns which prompted the Court to invalidate provision of direct instructional services to nonpublic school students within the context of the parochial school itself.

67. The Supreme Court, in footnote 14 thereof, stated:

> The purpose of the program is to aid school children and the use of convenient local centers is a sensible

way to implement the program. Although the public schools may often be used, considerations of safety, distance, and the adequacy of accommodations on occasion will justify the use of public centers or mobile units near the nonpublic school premises. *Id.*, at 42. Certainly the Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community."

68. In subsequent litigation involving the use of mobile instructional units as "neutral sites", courts have consistently sustained the constitutionality of provision of direct instructional services off the premises of the parochial school to the students attending such parochial school.

69. Again, the homogeneous religious composition of the student body receiving instruction at the "neutral site" was not perceived as inconsistent with the requirements of the Establishment Clause.

70. In this instance, however, the Court has before it not a mere neutral site but rather a public school district; thus, while the students may be of the same religious denomination, this fact in and of itself does not render the act unconstitutional.

71. In fact, Judge Kaye in the Court's opinion in *Board of Education of the Monroe-Woodbury Central School District v. Wieder, et.al.*, 72 N.Y.2d 174, specifically alluded in footnote 3 to the fact that "It may well be that certain of the services in controversy could be furnished to defendants at neutral sites if plaintiff determined to do so (*See Wolman v.*

Walter, 433 U.S. 229, *supra*). This declaratory judgment action poses only the abstract question whether the services *must* be furnished in public schools (as plaintiff insists) or *must* be furnished separately (as defendants insists); the actual services involved are not even fully specified. We therefore have no occasion to—nor could we—determine whether any particular services could be rendered in conformity with constitutional principles".

72. It is readily apparent from the foregoing and from the Court's construction of the "dual enrollment" statute that the Court of Appeals specifically contemplated and approved the possibility of homogeneous classes of Satmar students being instructed by public employees at a neutral site.

73. Thus, the issue raised herein is more akin to the issue reserved by the Court in *Wieder, supra*.

74. The Court's opinion notes:

> Whether a school board might, as a matter of choice, offer certain services to defendant-children at a neutral site (as plaintiff allegedly is doing for services to other children) without running afoul with the Establishment Clause (U.S. Const., 1st Amndt; *see also*, N.Y.Const., art. XI, §3) is a question not presented by this case, because no such proposal is before us."

75. In effect, the public school district serves as its own neutral site, separate and apart from the parochial schools of the Village.

76. The Kiryas Joel Village School is located at a site which is not physically or educationally identified with but is reasonably accessible to the handicapped children residing within the Village.

77. Thus, this litigation directly addresses the reserved issue, but within the context of a public school district, rather than a mere neutral site.

The Statute is Consistent with the Religion Clause of the Constitution of the State of New York

78. Article XI, §3 of the Constitution of the State of New York prohibits the state or its political subdivisions from using their property or credit, directly or indirectly, ". . . in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught . . ."

79. The Kiryas Joel Village School District is not a school or institution of learning "wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught . . ."

80. It is a secular public school district, utilizing secular educators to teach secular subjects to handicapped students at a public site.

81. Thus, Chapter 748 of the Laws of 1989 is not inconsistent with the provisions of Article XI, §3 of the Constitution of the State of New York.

The Irrelevancy of Materials Related to Religion, Culture and Lifestyle of the Satmar Hasidim

82. Upon information and belief, plaintiffs have attempted to color the record by presenting irrelevant materials, including newspaper articles, treatises and pleadings from unrelated litigation, concerning the religion, culture and lifestyle of the Satmar Hasidim.

83. Upon information and belief, these materials are irrelevant to the constitutionality of the statute, since the Satmarer have not asserted that the public school placement at the Kiryas Joel Village School District interferes with their free exercise of their sincere religious beliefs by forcing them to choose between following the precepts of their religion and foregoing benefits on the one hand and accepting benefits while violating their religious beliefs on the other.

84. In any event, the materials submitted as to the religion, culture and lifestyle of the Satmarer provide ample reputation of the argument that the Kiryas Joel Village School District will be perceived by an objective observer as an endorsement of the precepts of Hasidism or of unique religious beliefs of the Satmar sect, since rules and regulations governing operation of the public school, including, but not limited to, the mixing of boys and girls for the purposes of instruction; the use of English rather than Yiddish as the primary language of instruction; the use of secular instructional materials; the subordination of male students to female teachers; and the secularization of the facility are in conflict with and in many ways are inconsistent with the required basic religious, cultural and lifestyle precepts of the Satmarer.

85. Since the school itself is purely secular, the fact that it serves a devout religious community is irrelevant to its constitutionality, and, consequently, this Court should disregard as irrelevant those materials included within plaintiffs' motion papers which relate to the religion, culture and lifestyle of the Satmarer.

86. Furthermore, the suggestion that the community is theocratic and that the school will necessarily be governed by Satmar principles is also refuted by the large percentage, more than fifty percent, of non-Satmar students in attendance thereat.

87. Upon information and belief, in a culturally and religiously pluralistic society, public officials are not required to set aside their own beliefs and values in performance and fulfillment of their secular duties and responsibilities.

This Court Should Deny Summary Judgment With Respect to Alleged "As Applied" Constitutional Violations

88. The Second Amended Complaint filed by plaintiffs herein asserts the facial unconstitutionality of Chapter 748 of the Laws of 1989; it does not allege or plead in the alternative that if the statute is held to be facially constitutional, it has nevertheless been *applied* in such a manner as to violate the Establishment Clause of the Federal Constitution or the provisions of Article XI, §3 of the Constitution of the State of New York.

89. The motion papers purportedly address only facial constitutionality of the statute under the religion and equal

protection clauses (See Worona affidavit sworn to May 2, 1991; paragraph "2".)

90. However, various affidavits submitted by plaintiffs in support of their motion refer to instances in which it is alleged that public officials have acted in an unconstitutional *manner* in implementing the statute.

91. Upon information and belief, plaintiffs' allegations with respect to the existence of "as applied" violations are not relevant to the facial constitutionality of the statute.

92. In *Bowen v. Kendrick*, 487 U.S.589, the United States Supreme Court found judicial precedent for distinguishing between the constitutionality of a statute on its face and its validity in its particular application.

93. In *Bowen, supra,* the Court held the statute before it to be constitutional on its face but remanded the matter to the District Court to determine whether a particular manner of application had the primary effect of advancing religion.

94. The Supreme Court noted that where a statute is constitutional on its face but where the District Court finds that a particular *manner* of application is unconstitutional, the appropriate remedy is to issue an order insuring that the particular manner of application will "comply with the Constitution and the statute", rather than to declare the unconstitutionality of the statute itself.

95. In the within action, the statute is facially constitutional; thus, this Court should separate out any potential constitutional difficulties with respect to a particular man-

ner of application until such time as plaintiffs formally amend the complaint to plead a cause of action to that effect.

96. Allegations with respect to alleged improper application of the statute raise triable issues of fact, not subject to disposition or resolution through plaintiffs' motion for summary judgment.

97. Upon information and belief, defendants are entitled to full discovery and disclosure with respect to the existence of any "as applied" violations, so that such issues are not properly before this Court for disposition at this juncture of the litigation.

98. Furthermore, plaintiffs Grumet and Hawks in their individual capacities lack standing to sue on those "as applied" violations not directly involving a "wrongful expenditure, misappropriation, misapplication, or any other illegal unconstitutional disbursement of *state funds* or *state property*" (State Finance Law, §123-b). (Emphasis supplied)

99. Under common law principles, such specific "as applied" violations would have to be within their zone of interest and have harmed them in a unique manner not shared by the public in general to give them standing to sue.

Allegations with Respect to Implementation of Individuals with Disabilities Education Act

100. Plaintiffs allege that the statute creating the Kiryas Joel Village School District is illegal because it is inconsist-

ent with federal and state statutes requiring that handicapped students be educated in the "least restrictive" educational environment with non-handicapped students to the maximum extent consistent with their special education needs.

101. Upon information and belief, the consistency of the statute with federal and state statutory requirements concerning identification, classification and placement of handicapped students is irrelevant to the constitutionality of the statute under the religion and equal protection clauses of the federal and state constitutions.

102. Whether creation of a Kiryas Joel Village School District is consistent with Article 89 of the Education Law or with the Individuals With Disabilities Education Act, its federal counterpart, is an issue totally divorced from the constitutionality of the act.

103. To the extent that the causes of action in the Second Amended Complaint are limited solely to the constitutional issues, and, more particularly, to the facial constitutionality of the statute, reference in the motion papers to special education compliance issues is beyond the scope of the Complaint and irrelevant to the motion for summary judgment declaring the statute to be facially unconstitutional.

104. Thus, whether students at the Kiryas Joel Village School District are being educated in the "least restrictive" environment raises triable issues of fact, subject to discovery and disclosure, which are thus not properly within the scope of a motion to declare the statute unconstitutional on its face.

The Creation of the Kiryas Joel Village School District is not Violative of the Equal Protection Clauses of the Federal and State Constitutions

105. Upon information and belief, the Equal Protection Clauses of the Federal and State Constitutions do not prohibit the incorporation of the Kiryas Joel Village School District with boundaries coterminous with those of a previously-existing governmental unit, i.e., the Incorporated Village of Kiryas Joel.

106. The Act of the State Legislature, approved by the Governor, which created such a district did not have a discriminatory or disproportionate impact upon plaintiffs or particularized injury to them in either their individual or representative capacities, and, thus, plaintiffs have no standing to sue for an alleged equal protection violation.

107. Plaintiffs have failed to allege that the Legislature and Governor acted with an intent or purpose to discriminate against them and, consequently, the Complaint is facially defective.

108. New school districts are frequently created from amidst the property of existing school districts.

109. Upon information and belief, no constitutional principle requires that there be cultural, religious and ethnic diversity within each new governmental unit, and, in fact, this is impossible in many areas of the State.

110. In this instance, the boundaries of the newly-created district were made coterminous with those of an existing

governmental entity, and, thus, were rationally-related to the delivery of municipal programs and services to residents of the Village.

111. Upon information and belief, the Legislature's neutral act of conforming the boundaries of the Kiryas Joel Village School District to the boundaries of the Incorporated Village served a legitimate governmental function.

112. Upon information and belief, the cases cited by plaintiffs are inapposite in that each involved the creation of *de jure* racially segregated school systems with an intent and purpose to segregate by race.

113. In the instant case, no such racially segregative intent is established.

114. Upon information and belief, the Complaint fails to state a cause of action for denial of equal protection under the Federal and State Constitutions.

(Sworn to by Terrence L. Olivo, June 11, 1991.)

APPENDIX H—Affidavit of Abraham Wieder.

Affidavit of Abraham Wieder in Support of Motion to Intervene

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

LOUIS GRUMET, *et al.*

Plaintiffs,

- against -

NEW YORK STATE EDUCATION DEPARTMENT, *et al.*

Defendants.

Index No. 441-90
Assigned Justice:
Lawrence E. Kahn

R.J.I. No:
0190-021649

STATE OF NEW YORK)
) s.s.:
COUNTY OF ORANGE)

ABRAHAM WIEDER, being duly sworn, deposes and says:

1. I am the duly elected President of the Board of Education of the Kiryas Joel Village School District ("the Board"), and I submit this affidavit in support of the Board's motion to intervene as a defendant in the above-captioned action.

2. I am personally familiar with the underlying facts and circumstances.

3. The above-captioned action was brought by summons and complaint served on or about January 19, 1990. The plaintiffs subsequently filed an amended complaint served on or about March 5, 1990.

Background Facts

4. By Chapter 748 of the Laws of 1989, which becomes effective July 1, 1990, the New York Legislature created and established a separate school district for the Incorporated Village of Kiryas Joel in Orange County, to be known as the Kiryas Joel Village School District, and to be governed by a board of education elected by the qualified voters of the Village. This law provides that the new school district shall have all the powers and duties of a school district under the State's Education Law.

5. This legislation removes the property within the Incorporated Village of Kiryas Joel from the Monroe-Woodbury Central School District ("Monroe-Woodbury").

6. The Legislature unanimously created the new school district because Monroe-Woodbury was not meeting the special educational needs of the handicapped children in Kiryas Joel Village. Those children speak Yiddish and they participate in cultural practices, customs and traditions concerning all aspects of their lives — from what they eat to what they wear — that differ greatly from those of the majority population. Monroe-Woodbury has refused to accommodate the distinct language and cultural needs of the handicapped children in Kiryas Joel by providing their education at a neutral site in their locality. Rather, it has agreed to provide them educational services only if they attend the public school outside the Village of Kiryas Joel and adjust to its foreign setting designed for the language and culture of the majority population.

7. Because Monroe-Woodbury's restrictions on the educational services for the handicapped children from Kiryas Joel would have a major adverse effect on their educational progress, the handicapped children in Kiryas Joel were not able to receive the special educational services they needed from the public educational system.

8. Under the direction and supervision of Emanuel Axelrod, the District Superintendent of the Orange-Ulster Supervisory District, and other responsible officials of the New York State Department of Education, an election for the Board of Education of the Kiryas Joel Village School District was held on January 17, 1990. Seven school board members were duly elected by the qualified voters of the

Kiryas Joel Village School District, and the office of Board President, Vice President, Treasurer, Secretary and Clerk were filled. I was duly elected President of the Board.

9. The Education Law of the State of New York provides that the Board is responsible for the governance, administration and delivery of educational programs and services to the approximately 3,300 school-age children residing within the boundaries of the new Kiryas Joel School District. At least 50 of these 3,300 students are handicapped as defined under federal and state law and thus entitled by law to special rights and benefits.

10. Under the direction and supervision of Emanuel Axelrod, the District Superintendent of the Orange-Ulster Supervisory District, and other responsible officials of the New York State Department of Education, the Board has been involved in numerous activities to meet its statutory obligation to have in place a new public school system for the children of the Kiryas Joel Village School District by July 1, 1990.

11. Plaintiffs have filed this action solely to challenge the legislation creating the new Kiryas Joel Village School District and its Board. If plaintiffs are successful in obtaining declaratory and injunctive relief, the Board will be deprived of its statutory authority to operate and the handicapped school children it serves will be deprived of the benefits of a school district established by the Legislature to serve their particular language and cultural needs, and will be left with no means of obtaining the appropriate individualized public education they are entitled to under federal and state law.

12. Conversely, if plaintiffs are unsuccessful, the Board will continue to exist as a legal entity with responsibility for the educational needs of the children of Kiryas Joel Village, and those children will have the benefits of an appropriate public education, as intended by the Legislature.

Interest of Proposed Intervenor-Defendant

13. CPLR §1012(a)(1) requires that an applicant be permitted to intervene "when representation of that person's interest by the existing parties is or may be inadequate and the person is or may be bound by the judgment".

14. Upon information and belief, the named defendants, including the Commissioner of Education of the State of New York, the State Education Department, The Board of Regents, The District Superintendent and the State Comptroller, will not adequately represent the interests of the Kiryas Joel School Board and the handicapped children it represents. The Board's interest is clearly separate and distinct from those of the named defendants and far less abstract, since the very existence of the Board is at stake and the Board has a more direct and specific interest"in the welfare of the handicapped children who live in the Kiryas Joel School District.

15. Defendant Commissioner of Education of the State of New York, on behalf of the State defendants other than the State Comptroller, has previously publicly expressed his view that the statue may ultimately be held to be unconstitutional. Upon information and belief, this prior written position of the named defendants compromises their ability to defend this action properly.

16. Moreover, the Board has better knowledge than the State defendants of the underlying factual issues raised by the Complaint, as more fully appears from intervenor-defendant's proposed Answer, a copy of which is annexed hereto and incorporated herein as Exhibit "A" in accordance with the provisions of CPLR § 1014.

17. Furthermore, there can be no doubt but that any decision with respect to the constitutionality of the statute will directly affect the rights of intervenor-defendant by depriving it of its legal authority to operate and to provide an appropriate public education for the children of Kiryas Joel.

18. Moreover, any decision between plaintiff and the named defendants herein will clearly bind the proposed intervenor-defendant, yet the Kiryas Joel School Board's own distinct and immediate interests will not be adequately represented by any of the named defendants.

19. CPLR § 1012(a)(3) also creates a right of intervention "when the action involves the disposition or distribution of . . . property and the person may be affected adversely by the judgment".

20. This action falls within CPLR § 1012(a)(3) inasmuch as the plaintiffs are attempting to prevent the State defendants from expanding monies or resources for the purpose of assisting the Board in fulfilling its statutory charge to provide for the education of the handicapped and other children living in the Kiryas Joel School District. Moreover, this action will determine whether the property located within the Incorporated Village of Kiryas Joel will be within the

sphere of responsibility of the proposed intervenor-defendant or whether such responsibility will revert to the Monroe-Woodbury Central School District.

Intervention by Permission

21. Should this Court specifically deny the within application for intervention as of right, in that event, the proposed intervenor-defendant seeks leave to intervene by permission of the Court in accordance with the provisions of CPLR §1013, for the reasons set forth above.

Timeliness

22. Since the Board's motion to intervene was filed the same week as plaintiffs' amended complaint, and since plaintiffs have not moved for preliminary injunctive relief nor taken any other step to proceed with this litigation other than file their complaint and amended complaint, the granting of intervention, whether as of right or by permission of the Court, will not delay determination of the action, nor will it prejudice the substantial rights of any party thereto.

Relief Sought

23. Upon information and belief, the application of the Board of Education of the Kiryas Joel Village Union Free School District for leave to intervene should be granted in all respects, and an order should enter (1) directing that the Summons and Complaint in the above-entitled action be amended by adding thereto the Board of Education of the

Kiryas Joel Village Union Free School District as an additional party defendant; and (2) allowing said defendant to serve its answer within twenty days after the entry of the order granting the within motion.

(Sworn to by Abraham Wieder, March ____, 1990)

APPENDIX I—Governor's Memorandum.

THE EXECUTIVE
Ch. 738

risks, if any, of irradiation to be completed within the next two years. In this way the people of this State may make an informed decision and reasoned choice about irradiated food in the future.

Approval of the bill is recommended by the Consumer Protection Board, the Attorney General, the New York Public Interest Research Group, Inc., the Environmental Planning Lobby, the National Coalition to Stop Food Irradiation, the Citizens Against Nuclear Trash, the Radiation Safety Corp., Food & Water, Inc., Residential Dining Services and Commissary Operations of Syracuse University and the Finger Lakes Organic Growers Cooperative, Inc.

The bill is approved.

MARIO M. CUOMO

KIRYAS JOEL, VILLAGE OF—SCHOOL DISTRICT

On approving L.1989, c. 748, the Governor stated:

July 24, 1989

The bill establishes a separate school district for the village of Kiryas Joel located in the town of Monroe, Orange County. The district is placed under the control of a board of education composed of from five to nine members.

It is regarded by opponents and proponents alike as a practical solution to what has been, so far, an intractable problem.

Lawyers for the State Education Department argue that the bill may be held to be unconstitutional. My Counsel disagrees and advises that the bill is, on its face, constitutional. I am persuaded by my Counsel's view.

The bill is an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of the same religious sect. Almost all of the approximately 3,000 school age children of Kiryas Joel attend private religious schools. However, the village has sought to obtain from the private school district special education services for handicapped children.

Under our Constitution as interpreted by the Supreme Court of the United States such special education services may not be provided at the religious school but may be provided at a neutral site that is not a public school.

There came a time when the school district refused to provide such services to the handicapped children of Kiryas Joel at a neutral site and instead insisted that the children receive the services at a public school. The parents of these children sent them to the public school for a brief period but ultimately refused to continue to do so.

Litigation arose and our Court of Appeals held that the school district could not be compelled to provide special education services at a neutral site. As a result, the

approximately 100 handicapped students in the village are not now receiving the special education services they need.

I believe that this bill is a good faith effort to solve this unique problem. And, as noted above, I am advised it is facially constitutional. Of course this new school district must take pains to avoid conduct that violates the separation of church and state because then a constitutional problem would arise in the application of this law. The village officials acknowledge this responsibility. I believe they will be true to their commitment.

The village of Kiryas Joel, the Monroe-Woodbury Central School District and the Orange County Executive recommend approval.

The bill is approved.

MARIO M. CUOMO